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No. ~~773~~ 15

In the Supreme Court of the United States

OCTOBER TERM, 1932

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF OF INTERSTATE COMMERCE COMMISSION

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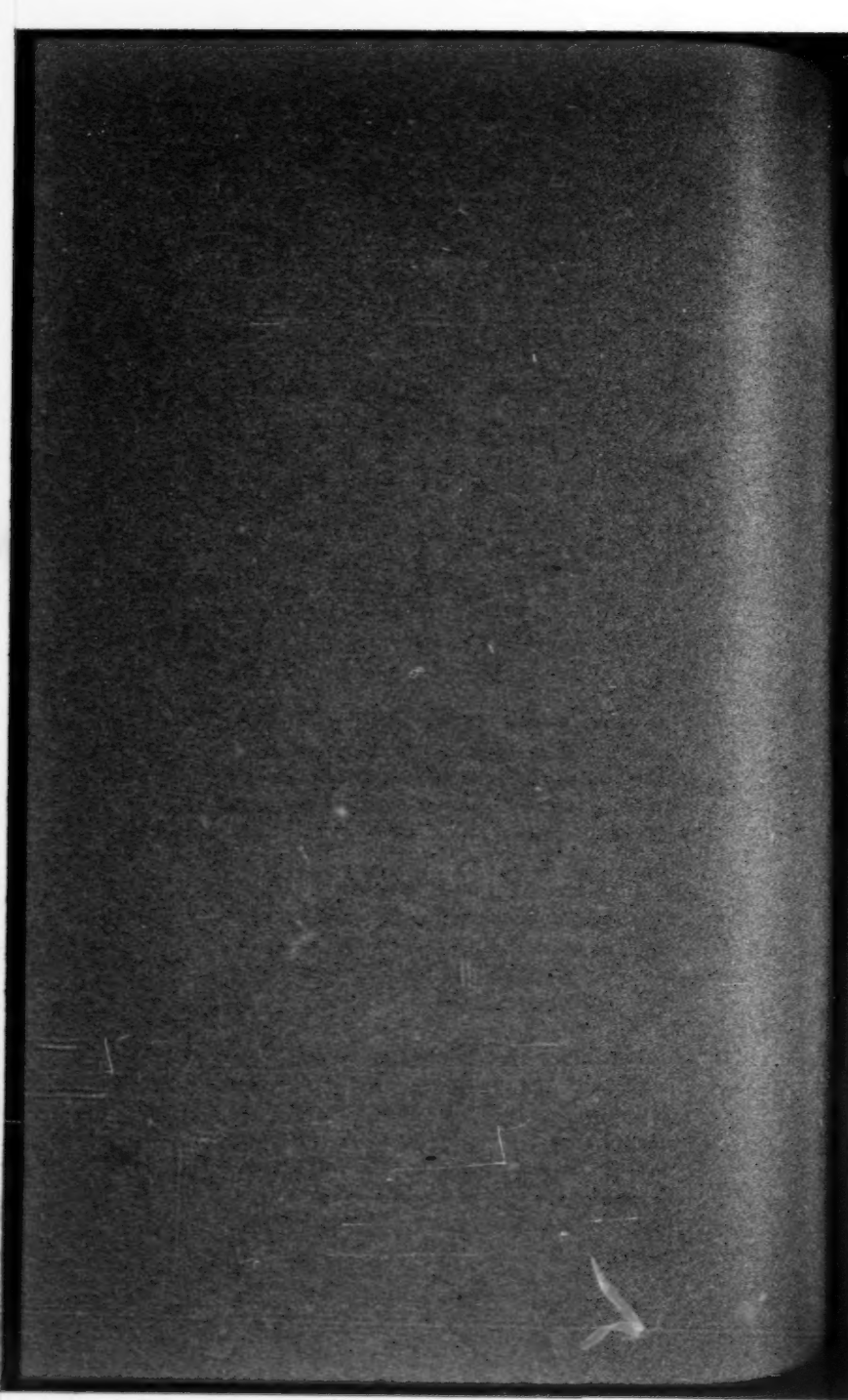

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INTERSTATE COMMERCE COMMISSION, PETITIONER
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THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD Company et al.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF OF INTERSTATE COMMERCE COMMISSION

OPINIONS

The memorandum opinion of the Supreme Court of the District of Columbia is unreported, but appears on pages 434–449 of the record. The opinion of the Court of Appeals of the District of Columbia is officially reported as 60 App. D. C. 403 and 55 Fed. (2d) 1028, and will be found on pages 641–655 of the record. The opinion and order of the Commission is reported as I. C. C. Val. Rep. Vol. 30, 1, and will be found at pages 24–388 of the record.

JURISDICTION

On July 3, 1930, the New York, New Haven & Hartford Railroad Company and its subsidiaries and lessors, hereinafter collectively referred to as the New Haven, filed a petition for writ of mandamus in the Supreme Court of the District of Columbia to compel the Interstate Commerce Commission, hereinafter called the Commission, to include in its published valuation under Sec. 19a of the Interstate Commerce Act, the "values" of certain trackage rights alleged to be "estates in perpetuity, the legal equivalent of an estate in fee simple, in the tracks of the New York and Harlem Railroad Company from Woodlawn to Forty-third Street, and in the Grand Central Terminal" and "a perpetual franchise" in The Boston Terminal Company properties. (R 22–23.)

The judgment of the Supreme Court of the District of Columbia dismissing said petition was entered April 3, 1931. Upon appeal, this judgment was reversed by judgment of the Court of Appeals of the District of Columbia, entered January 18, 1932.

The Commission filed its petition for writ of certiorari under subsection (a) of Sec. 240 of the Judicial Code as amended and reenacted by Act of February 13, 1925 (c. 229, 43 Stat. 936, 938, 28 U. S. C. §347), and said petition was granted by this Court April 18, 1932, — U. S. —, 52 Sup. Ct. Rep. 496.

STATUTES

The pertinent provisions of the Valuation Act (c. 92, 37 Stat. 701), as amended by Act of June 7, 1922 (c. 210, 42 Stat. 624), and commonly known as Sec. 19a of the Interstate Commerce Act (Sec. 19a, title 49 U. S. C.), together with pertinent provisions of Sec. 15a of the Act (c. 91, 41 Stat. 456, 488, Sec. 15a, Title 49 U. S. C.) are set out in an appendix to this brief.

STATEMENT

The controversy had its inception in an investigation instituted by the Commission under Sec. 19a to find and report the value as of June 30, 1915, of the property owned or used by The New York, New Haven & Hartford Railroad Company and its several lessors and subsidiaries, the other respondents herein.

The New Haven operates certain owned and leased lines of railroad in Massachusetts, Rhode Island, Connecticut, and New York. (R. 434.) Its tracks enter the State of New York from Connecticut at or near Port Chester, and at Woodlawn connect with the tracks of the New York and Harlem Railroad Company, hereinafter called the Harlem, now operated under lease by the New York Central Railroad System, hereinafter called the Central, which also owns a majority of the Harlem's stock. (R. 476, and compare I. C. C. Val. Rep. Vol. 27, 1, 208, 440.) From Woodlawn south

to and into Grand Central Station, a distance of about 12 miles, the New Haven passenger trains operate over the Harlem's tracks and the New Haven and the Central use the station in common, all pursuant to two contracts hereinafter mentioned. (R. 434–437.) At Boston, Massachusetts, the New Haven's tracks connect with those of the Boston Terminal Company, hereinafter called the Boston Terminal, and from the point of connection to and into the South Station at Boston the New Haven passenger trains operate over the Boston Terminal's tracks, and the New Haven, and the Central, as lessee of the Boston and Albany, participate in the use of the Boston Terminal's South Station pursuant to Chap. 516, Laws of Massachusetts, 1896. (R. 6.)

The New Haven has no investment either in the Grand Central Terminal and its approaches in New York or in the South Station in Boston. It has consistently reported its operating rights as "trackage rights." (Exs. 17–22, R. 631–637.) Those properties belong to and are operated by other common carriers to whom the Commission, following its usual methods of valuation determined in its first valuation decision (R. 388–396) inventoried and valued them as "owned and used," with appropriate reference to the New Haven's rights (R. 425, 428–429).

The proceeding before the Commission.—At the valuation hearing, the New Haven presented in evi-

dence certain charters, contracts, agreements, and legislative enactments relating to its trackage rights, and contended that such rights to operate into these passenger terminals were not ordinary trackage rights, but estates in, or joint ownerships of, the terminals themselves, part of the values of which should be apportioned to it under the Act. (R. 63, 65.)

The New York Terminal.—The New Haven's trackage right to use the Harlem's tracks jointly with the Central is held under an "Agreement and Contract of Transportation" (R. 520) entered into between the Harlem and a predecessor of the New Haven on March 17, 1848, by which the Harlem granted to the New Haven the right—

> to run their trains, engines, and cars for the transportation of passengers, mails, expresses, freight, etc., over the track or tracks of the road of the New York and Harlaem Railroad Company from the point of junction aforesaid to and into the city of New York, * * *. (R. 435, 520.)

Under this agreement the New Haven was to furnish its own haulage and to pay the Harlem "as full compensation for the use and occupation of their track or tracks as aforesaid a certain sum for each passenger transported," and a portion of the tariff rates received for the transportation of express and mail matters. (R. 521–522.) The Harlem was to "keep its road from the aforesaid point of junction to the termination of the part

thereof to be used by the New York and New Haven Railroad Company in good and sufficient repair." (R. 524.) The contract was to continue in force during the terms of their charters, respectively, and for all renewals thereof, and contained a provision for the adjustment of compensation every five years by agreement, or, in event of failure to agree, by arbitration. (R. 524.) Two arbitration awards have been made. (R. 526–528.)

By Chapter 143 of the Laws of 1848 the New York Legislature authorized the New Haven to enter upon and run its cars and engines over the road of the Harlem Company from the point of junction into the City of New York, "upon such terms and to such point as has been or may hereafter be agreed upon by and between said Companies; * * *." (R. 529, 530.)

Pursuant to the statute and agreement, the New Haven connected its tracks with those of the Harlem, and ever since has operated its trains over them into the City of New York. (R. 436.)

In April, 1872, the Central, which had theretofore entered New York City only on the Hudson River side of Manhattan Island, connected its road with the Harlem road about five miles north of 42nd Street, and also arranged with the Harlem for the joint use of its tracks from that point into the City of New York. (R. 436.)

On November 1, 1872, the Harlem, the Central, and the New Haven Companies entered into an agreement called a "Tripartite Lease" (Ex. 10, R.

532) under which the Harlem was to construct the original Grand Central Depot at 42nd Street and lease to the Central and the New Haven the use of this station jointly with itself.

On April 1, 1873, the Harlem leased all of its steam railroad property to the Central for a term of 401 years, subject to the provisions of the contract between the Harlem and the New Haven, which was specifically assigned to the Central, except that the Harlem was to keep the contract letting the New Haven use nonleased horse-car tracks below 42nd Street. (Ex. 11, R. 559.) This lease has been in full force and effect down to the present time. (R. 436.)

By a new tripartite agreement dated July 24, 1907, between the Central, the New Haven, and the Harlem superseding and terminating the "Tripartite Lease" of 1872 (R. 608), provision was made for certain additions and changes in the New York terminal facilities required by Chapter 425 of the Laws of 1903 of New York (Ex. 12, R. 582), and for the construction and joint use of the present Grand Central Terminal. The Central agreed at its sole expense to acquire all lands, make the changes, and construct the railroad terminal, and acting for itself and the Harlem, leased to the New Haven, during the term of the New Haven's charter and all renewals thereof (R. 595)—

> *the use,* in common with the Central Company, subject to all the provisions of this agreement, of the said Railroad Terminal

> for the accommodation of the traffic of the New Haven Company, other than freight traffic, * * *. (Italics ours.)

with the proviso that the New Haven's right to the *use* of the terminal should in no event exceed 50 per cent of its maximum capacity. (R. 437, 595.) As compensation the New Haven was to pay to the Central *that proportion* of four and one-quarter per cent interest on the cost of construction and of the annual expenses for maintenance and operation "which the use of the Railroad Terminal by the New Haven Company bears to the entire use thereof," determined on a wheelage basis. (R. 595–597.)

The New Haven contributed no part of the cost of the terminal nor of the depressing and four-tracking of the Harlem's main line from Woodlawn to the terminal. (R. 437.)

The Boston Terminal.—By Act of June 9, 1896, the Massachusetts Legislature incorporated the Boston Terminal Company for the purpose of constructing and maintaining a union passenger station in the City of Boston, and to provide and *operate* adequate teminal facilities for the five several railroad companies entering the city from the south and west and for accommodation of the public. (R. 616.) These five railroad companies, including the New Haven Company, were authorized to subscribe for the capital stock of the Terminal Company, which was fixed at $500,000, in equal

amounts. The management of the station and its approaches was vested in a board of five trustees, one appointed by each of the several railroad companies from its board of directors. The Terminal Company was authorized to raise money by the issuance of bonds secured by mortgages or pledges of its property. (R. 617.)

By Sec. 9 of the Act it was provided that the said railroad companies should, upon its completion, use the station and the approaches for all their terminal passenger business in Boston, instead of the terminals then used by them. (R. 620.)

Other provisions of the Act required the railroads to pay to the Terminal Company, in proportion to the use made, such amounts as should be necessary to pay the expenses of the Terminal Company's corporate administration and the maintenance and operation of the station and facilities connected therewith, including insurance, repairs, taxes, and assessments, interest upon its bonds, and a dividend not to exceed 4 per cent per annum upon its capital stock. The proportion of use by the several companies was to be fixed by agreement between them, or, in case of failure to agree, by the Massachusetts Board of Railway Commissioners, and payment made by the companies should be deemed "a part of their operating expenses." (R. 621.)

Pursuant to the statute, each of the five companies subscribed to the Boston Terminal Com-

pany's capital stock, and the terminal known as the South Station and its approaches were constructed by the Boston Terminal Company, which has ever since operated the property. On June 30, 1915, $14,500,000 of first-mortgage bonds of the Boston Terminal Company were outstanding. (103 I. C. C. 707, 719.)

The New Haven, having acquired the property of the New England Company through merger, and leased the property of Boston and Providence and Old Colony Companies, now controls 80 per cent of the capital stock of the Terminal Company, and the Central, as lessee of the Boston and Albany, controls the balance. (R. 439.)

The issue of the nature of the New Haven's alleged joint ownership under the contracts and statutory enactments, together with many others raised by the New Haven, was submitted to the Commission on June 15, 1926.

The Commission's decision.—After considering the evidence the Commission reported its valuation for rate-making purposes of the respondents' property in a report and order dated November 13, 1929. (I. C. C. Val. Rep. Vol. 30, 1–291.) The full text thereof appears in the record as Exhibit 1 to the New Haven's petition. (R. 24–388.)

In this report and order the Commission considers and fully determines the issue of joint ownership (R. 60–67) holding adversely to the New Haven's contention (R. 66–67, 76).

In respect of all the New York property the Commission recites in substance that the New Haven has no investment therein (R. 63); that the property is maintained solely at the expense of other carriers, which own and use it (R. 64); and that the contracts contain no provision for acquiring a part ownership or an interest in the fee (R. 64, 66).

It further recites that Sec. 15a provides that values found under Sec. 19a shall be deemed to be the values for rate-making purposes and requires that rental payments for trackage rights, or other joint-facility rents, shall be deducted the same as operating expenses in computing allowable net railway operating income; and that under such provisions to value the trackage rights for the purposes of rate making would result in duplication.

The Commission noted that only the magnitude distinguished the New Haven's rights from many similar rights of carriers to enjoy the use of other carrier's property along with the owners to whom the property is valued (R. 65), and it held that for the purpose of ascertaining a value for rate-making purposes no additional specific value should be reported for these commercially valuable contract rights (R. 66–67). As to the property of the Boston Terminal Company, the Commission recites that it has heretofore classified and valued all of that company's property as owned and used by it as a common carrier in the valuation of the *Boston Terminal Company*, 103 I. C. C. 707, and it declines

to assign any additional specific value to the rights of the New Haven therein. (R. 67.) The Commission in its order finds the terminals are not "jointly owned" and designates the rights collectively under "jointly used property" as "important trackage rights" as follows (R. 76):

> *Jointly used property.*—The carrier has *no property classified as jointly owned and used,* except minor facilities. It has *rights to use* the property of other carriers with a road mileage of 53.52 miles and grants trackage rights to other carriers over 54.43 miles of its own road mileage. *Important trackage rights used by the carrier are the Boston terminal, the South Station, with 13.033 miles of all tracks, the entrance to New York, N. Y., from Woodlawn Junction to Fifty-ninth Street, with 45.465 miles of all tracks, the Grand Central Terminal, with 27.173 miles of all tracks, and the Mott Haven Yard, with 13.973 miles of yard tracks.* In Appendix 2, under leased railway property, will be found a statement showing the property used jointly with other carriers and the terms of use. (Italics ours.)

In Appendix 2 thereto, the jointly used properties are fully described, as are the terms of the use. (R. 275–276.)

For the purpose of explaining the methods of valuation employed, the order made reference to and incorporated therein that portion of the Commission's decision in its first valuation case, *Texas Midland Railroad,* 75 I. C. C. 1, 108–182 (R. 127),

designated as Appendix 3, wherein such methods were determined and stated. The parts of that Appendix 3 relating to trackage rights, together with appropriate excerpts from the opinion, appear in the record as Exhibit 2 to the New Haven's petition. (R. 388–396.)

The proceedings in the Supreme Court of the District.—The New Haven, alleging that its rights constitute estates in the terminal properties, that the Commission is without authority to limit its findings to a value for rate-making purposes, and that the Commission's refusal to value the rights disregards a mandatory duty under Sec. 19a, sought a writ of mandamus from the Supreme Court of the District of Columbia. (R. 1–24.)

The Commission's answer (R. 404–423) set out that it had fully considered the New Haven's contention and decided adversely thereto; that it had fully complied with the statute in valuing all of the physical property mentioned in the petition to the owning carriers, and in making appropriate reference to the "rights" in the report of the owning carrier as well as in the report of the joint user under its rules and methods; that the Act contained no specific instructions as to the valuation of property permissively used under trackage rights; that it had to exercise discretion to interpret the Act; and that it interprets the Act as not requiring the specific valuation of such rights, alleged to be merely licenses dependent upon rental,

as shown by the New Haven's sworn reports (cf. Exs. 17–20, R. 631–636) to the Commission (R. 405–419).

The answer also alleged the failure of the New Haven's petition to state a cause of action for mandamus, reciting that said petition sought to use mandamus to annul the final valuation and reverse the decision and to direct the Commission to exercise its discretion in a particular way to interpret the Act so as to apportion to the New Haven part of the value found for the property of third parties not parties to the case by recognizing the New Haven's alleged title in the property. (R. 420–422.)

The case was submitted in that Court upon the petition, the rule to show cause, the answer and further pleadings, and upon oral and documentary evidence offered at the trial which occurred on February 12, 1931.

The opinion of the Supreme Court.—The Court, in a memorandum opinion by Chief Justice Alfred A. Wheat, filed April 2, 1931, refused the writ (not reported but included in record, pp. 434–449).

This opinion held that the Commission's method of valuation, adopted in the *Texas Midland Railroad case* and steadfastly followed in more than a thousand valuations since reported, was so reasonable and so consistent with the purposes of the Act that any other would lead to unjust and unreasonable results (R. 442); that the New Haven's rights were not those of an owner but merely

trackage or terminal rights under *Union Pacific R. Co.* v. *Chicago, R. I. & P. R. Co.*, 163 U. S. 564 (R. 445, 447); and that "the Commission did not err in declining to value the rights of the relator" (R. 449).

The opinion of the Court of Appeals.—Upon appeal to the Court of Appeals of the District of Columbia, the judgment was reversed by judgment entered by concurrence of four justices, one not sitting, on January 18, 1932 (60 App. D. C. 403; 55 Fed. (2d) 1028). The accompanying opinion by Mr. Justice Van Orsdel held, among other things, that the case of *Union Pacific R. Co.* v. *Chicago, R. I. & P. R. Co., supra,* relied upon by the Supreme Court of the District of Columbia, had little or no bearing on the issues herein presented because the contract there "granted merely trackage rights" (R. 647); that the New Haven *owns* and uses a perpetual easement which coupled with a franchise constitutes a dominant servitude in the New York terminal approaches (R. 643); that it *owns* and uses *a base fee* in the undivided half of the Grand Central Terminal (R. 646); that the Boston Terminal Company is little more than a holding company and that the New Haven is one of the "real owners" of the Boston property (R. 648); that the value directed to be found by Sec. 19a is not limited to a value for rate-making purposes, which is stated to be only one of a number of objects for which the Commission's valuations are to be *prima facie* evidence (R. 651); that the Valua-

tion Act directly and expressly requires the valuation of all property whether physical or incorporeal, including the "joint use of property owned by other carriers" (R. 651); that the Commission's failure to comply therewith is not an exercise of discretion but a refusal to act (R. 654); that this case is distinguishable from its prior holding in *United States ex. rel. Kansas City Southern Ry. Co. et al.* v. *Interstate Commerce Commission,* 6 Fed. (2d) 692 (R. 652); and that under the decision of this Court in *Kansas City So. Ry.* v. *Int. Com. Comm.,* 252 U. S. 178, mandamus will lie to compel the Commission to assume jurisdiction of the specific duty of valuing these "specific well-defined portions of the road which they refused to value" (R. 653–654).

QUESTIONS

The petition for the writ of certiorari which was granted by this Court presents the following questions:

> 1. Whether Sec. 19a of the Interstate Commerce Act so explicitly requires the Commission to ascertain and report a specific value for all incorporeal property, including trackage rights in property owned and used by other carriers, that the Commission is without discretion in the matter and may be compelled by mandamus to specifically value such use of property?
>
> 2. Whether in its report of its valuation investigation under the Act, the Commission

may limit its specific findings of a single-sum value to a value for rate-making purposes?

3. Whether in an action for mandamus the courts of the District of Columbia can review the Commission's classification of a carrier's rights as important trackage rights and determine that they constitute estates in the physical properties of other carriers not parties to the action?

4. Whether the New Haven's rights to participate in the use of tracks and terminals belonging to and operated by other carriers, upon payment of a compensation for the use enjoyed, constitute estates in the property and not ordinary trackage rights?

SUMMARY OF ARGUMENT

I

The statutory direction in Sec. 19a of the Act for the valuation of "all the property owned or used by every common carrier" is general, does not prescribe the method to be pursued in valuing property permissively used under trackage rights, and requires interpretation in the light of the purpose of the legislatiton as a whole. The Commission's interpretation of the term as not requiring the separate and specific valuation of trackage rights in property owned and used by another carrier, and its practice of reporting such property in the inventory of the owning carrier, with a statement of the terms and extent of the use in the re-

port of the carrier holding such rights, is reasonable and in accord with the purposes of the legislation, and, in the absence of positive directions to the contrary, was within the discretion of the Commission to make. This administrative interpretation long and consistently adhered to is entitled to weight. Congress, with knowledge of the Commission's interpretation, having amended the Act without directing the alteration of the practice and having subsequently in Sec. 15a required the use for rate-making purposes of the valuations so made, has impliedly approved this administrative interpretation and practice.

II

The Act contains no positive instruction as to the purpose of the valuation to be made, and the Commission acted within a proper authority in stating its final single-sum values to be for rate-making purposes. At the enactment of the Valuation Act the primary function of the Commission was the regulation of rates, and a valuation for rate-making purposes met all the requirements and fell within the evident purposes of the legislation. The subsequent enactment by Congress of Sec. 15a requiring the use of 19a values for rate-making and recapture purposes is equivalent to a declaration of legislative intention that the values to be made under Sec. 19a should be for rate-making purposes.

III

The Commission did not refuse to take jurisdiction, but, on the contrary, fully performed its duty. It valued all the property comprising the terminals to the New York Central System (including the Harlem) and the Boston Terminal Company. It heard the precise issue of the New Haven's alleged joint estate in the physical properties of these other carriers, and fully decided in the New Haven valuation that the New Haven had no joint ownership. It therefore classified the New Haven's "rights of use" under "jointly used property" as "important trackage rights." The Court of Appeals, in holding in this action that the New Haven is the owner of estates in the terminal properties of the New York Central System and the Boston Terminal Company, has used mandamus not only to decide a question of title to property involving the rights of these owning carriers, not parties to the action, but also to reverse the said three valuation decisions of the Commission.

IV

The language of the several grants to the New Haven conveys to the New Haven no ownership in the physical properties permissively used in common with the owners. The grants are solely of a *permission* to use upon payment of a rental which varies according to the extent of the New Haven's actual exercise of the permission granted. Under

the decision of this Court in *Union Pacific R. Co.* v. *Chicago, R. I. & P. R. Co., supra,* the grants are of trackage rights and alien neither property nor its possession. The language of an Act of the New York legislature sanctioning the contract of transportation granted only a permissive franchise to operate pursuant to such contract. The practical construction by the parties and the New Haven's own sworn reports to the Commission harmonize with the grant of mere permissive rights and are in conflict with the construction placed on the grants by the Court of Appeals. The Supreme Court of the District was, therefore, correct in holding that the owning carriers did not part with any ownership in, or possession of, their properties, and the Court of Appeals, in holding that the grants are of an undivided ownership in the properties, has read into the grants, by construction, conveyances not intended by the parties.

ARGUMENT

I

The Act does not explicitly require the Commission to ascertain and report a specific value for all incorporeal property, including trackage rights in property owned and used by other carriers

The issue in an action for mandamus to require the Commission to perform a statutory duty "is confined to a consideration of the face of the statute and the nonaction of the Commission in a matter

purely ministerial." *Kansas City So. Ry.* v. *Int. Com. Comm., supra,* 187.

Sec. 19a provides:

> (a) That the Commission shall, as hereinafter provided, investigate, ascertain, and report the value of all the property owned or used by every common carrier subject to the provisions of this Act. * * * The Commission shall make an inventory which shall list the property of every common carrier subject to the provisions of this Act in detail, and show the value thereof as hereinafter provided, and shall classify the physical property, as nearly as practicable, in conformity with the classification of expenditures for road and equipment, as prescribed by the Interstate Commerce Commission.

In subsection (b) it is provided:

> * * * said Commission shall ascertain and report in detail as to each piece of property, other than land, owned or used by said common carrier for its purposes as a common carrier, the original cost to date, the cost of reproduction new, the cost of reproduction less depreciation, * * *. The Commission shall in like manner ascertain and report separately other values, and elements of value, if any, of the property of such common carrier, and an analysis of the methods of valuation employed, and of the reasons for any differences between any such value and each of the foregoing cost values.

In its valuation, pursuant to the above statute, of the property of the New Haven as of June 30, 1915 (I. C. C. Val. Rep., Vol. 30, 1, R. 24–388), the Commission after a full hearing found that the New Haven by virtue of its rights to operate its trains into the New York and Boston terminals acquired no joint ownership in the property comprising the same (R. 64, 66–67).

In its order, it classified the New Haven's rights as "important trackage rights" (R. 76), and, in accordance with its usual practice, it stated in its report the extent of the use made of the trackage and terminals by the New Haven and the basis and the amount of the rentals paid therefor (R. 275–276). In its report of the value of the New York Central, it has inventoried and valued as owned by the Harlem, leased to and used by the Central, all the property comprising the Grand Central Terminal and its approaches, and therein makes reference to the "trackage rights" of the New Haven and the rentals received therefor. (I. C. C. Val. Rep., Vol. 27, 1, 303, 304, 309.)

Likewise, the entire physical property composing the Boston Terminal is inventoried and valued to the Boston Terminal Company as the owning and using company, the "trackage rights" of the New Haven therein being shown and referred to in a similar manner. (103 I. C. C. 707, 730.) In stating its final single-sum value of the New Haven, it recites (R. 73):

> We have given careful consideration to all facts of record pertaining to the value of the common-carrier property of the carrier as an organized, developed, well-maintained, and seasoned property in operation as a going concern.

But it declined to find a specific sum as the value of the New Haven "trackage rights," saying (R. 64):

> In our finding of value of the property owned or used in common-carrier service for rate-making purposes, we are of the opinion that no specific sum should be found for the carrier's right to use these tracks.

The question presented is whether the Commission by its failure to assign any specific value to the New Haven's trackage rights in the New York and Boston property has violated any positive requirement of the statute.

The requirements of the Act.—This Court in *Wilbur* v. *United States*, 281 U. S. 206, 218, has said that before mandamus will lie to compel an administrative body to perform a duty, that duty must be "so plainly prescribed as to be free from doubt and equivalent to a positive command * * *." And it has further said (p. 219):

> But where the duty is not thus plainly prescribed but depends upon a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discre-

tion which cannot be controlled by mandamus.

The intent of Congress in respect to the property to be valued is not necessarily to be derived by reference solely to the words "all the property owned or used," but reference may be had to the Act as a whole and to the design and purpose thereof. As said by this Court in *Ozawa* v. *United States*, 260 U. S. 178, 194:

> It is the duty of this Court to give effect to the intent of Congress. Primarily this intent is ascertained by giving the words their natural significance, but if this leads to an unreasonable result plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look to the reason of the enactment and inquire into its antecedent history and give it effect in accordance with its design and purpose, *sacrificing, if necessary, the literal meaning in order that the purpose may not fail.* See *Holy Trinity Church* v. *United States*, 143 U. S. 457; *Heydenfeldt* v. *Daney Gold Mining Co.*, 93 U. S. 634, 638. (Italics ours.)

The Court of Appeals has declared that the Act must be construed as requiring the specific valuation of "all the property" in the broad sense of that term, including all incorporeal property. (R. 651, 653.) This conclusion necessarily leads to results so unreasonable that it is hardly conceivable that Congress so intended.

Most carriers possess contract rights to make some use of items of property operated by other carriers varying from such minor items as track connections, signal installations, and small pieces of track up to whole sections of railroads. The use may vary from an occasional and incidental use of the property to a regular and consistent one, and even where the use is regular it generally varies in extent from day to day.

In addition, most carriers possess many other valuable contract rights incident to their operations, examples of which are contracts for the purchase of materials and supplies, for the services of professional experts, for advertising space, and agreements to carry property for specified charges.

All these incorporeal rights constitute property within the broadest meaning of that term.

The unreasonable result consequent upon the adoption of such interpretation is further emphasized when we consider that if the New Haven's right to use the property held by the Central must be valued to the New Haven, likewise the New York Central's contract right to receive payment for the New Haven's use constitutes property which must be valued to the Central. If other carriers should be admitted to the use of the property, under similar terms, their contract rights likewise would have to be valued and the value of the physical property in common-carrier service by such means could be indefinitely increased by contracts among carriers for the use of the same.

Under such construction of the Act, two carriers whose physical properties have been once fully valued could, by the device of entering into contracts for the use of each other's property, thereby create additional specific property which must receive further valuation. Such contract arrangements undoubtedly create new rights and obligations between the contracting parties which may influence the earning power and successful operation of the carriers involved and may require consideration in the statement of a single-sum judgment value of a carrier as a going concern. They do not, however, require additional investment and add no specific *property* which is devoted to public use.

The contention that rights of use in property must under the Act be valued specifically and separately from the physical property in which such rights exist was advanced early in the valuation work and the Commission in denying the contention gave the following as its reasons (*Texas Midland Railroad, supra,* pp. 23–24, R. 395–396):

> It is a sufficient answer to this contention to state it is now universally accepted that it is the fair value of the property used by the public-service corporation in serving the public which is to govern in fixing rates. *San Diego Land Co.* v. *National City,* 174 U. S. 739. This being true, the value of that property can not be increased or diminished by contracts or other arrangements between the carriers themselves. In the absence of

> an improper payment as rental the public is not concerned with the acts of carriers between themselves. *The law requires the ascertainment of values for property owned or used, but not the value of the use.*
>
> The attempt to fix the value of use would be speculative, because of the absence of any sound basis upon which to proceed, and if obtained would result in the inflation of the property values of the carriers upon which the public may be required to pay a fair return. Indeed, such a finding by us would have the effect of inviting the carriers to make arrangements between themselves with the view of increasing the value of their property. (Italics ours.)

An interpretation of the Act as requiring the Commission to specifically determine the value of every incorporeal right incident to a carrier's operations as "property owned or used" would unquestionably engage the Commission in a useless and endless pursuit of values, which, if determined, would be so speculative, elusive, and shifting as to serve no helpful purpose contemplated in the Act. Such an intention, unless required by the most positive and specific language, should not be attributed to Congress.

That the term "property owned or used" is susceptible of and requires interpretation is in effect admitted by the New Haven itself, for it states that it is not using the term as including contracts and individual rights in the "constitutional" sense. (Brief in Opposition to Petition for Certiorari,

pp. 20–21.) It contended before the Commission and the lower courts that its rights were such as to constitute it the joint owner of an undivided interest in the terminal properties and that it has physical and not incorporeal property which the Commission has failed to value. The Court of Appeals, however, has based its decision largely upon the ground that the Act requires the valuation of all incorporeal property (R. 653) and applies to the New Haven's rights of use, however such rights best may be defined (R. 650–651). This holding, with all deference, we believe to constitute the fundamental error of that court.

The Act requires valuation of physical property.—For some years prior to the enactment in 1913 of the Valuation Act, the Interstate Commerce Commission had repeatedly recommended that provision be made by Congress for a physical valuation of railway property. (Annual Reports, 1907, p. 149; 1908, pp. 83, 96; 1909, p. 6; 1912, p. 70.)

The hearings before the congressional committees on Interstate Commerce of the Senate and House considering the Valuation Act indicate that the proposed legislation concerned the "physical valuation" of railroad properties. They are entitled "Physical Valuation of Property of Common Carriers," Senate Library Vol. 15, No. 6, and "Physical Valuation of Railroad Property," Senate Library Vol. 36, No. 4. (R. 442.)

The Act itself after directing that the Commission "shall, as hereinafter provided, investigate,

ascertain, and report the value of all the property owned or used by every common carrier" directs the Commission to "make an inventory which shall list the property of every common carrier * * * in detail," and to "classify the physical property" in conformity with the Commission's classification of expenditures for road and equipment. It further directs the Commission in subparagraph (b) to "report in detail as to each piece of property, * * * the original cost to date, the cost of reproduction new, the cost of reproduction less depreciation, * * *." All of this language clearly indicates that the Commission is to inventory the physical property. None of it explicitly states that all incorporeal property is to be inventoried and valued.

The Court of Appeals concludes that the direction in the Act at one place to "make an inventory which shall list the property * * * in detail" and at another to "classify the physical property, as nearly as practicable, in conformity with the classification of expenditures for road and equipment" indicates a clear intention to distinguish between physical and nonphysical property and to require that all nonphysical property is to be inventoried and specifically valued. This conclusion is not necessarily or reasonably to be drawn.

The direction to "make an inventory which shall list the property," is followed by the further direction to "show the value thereof *as hereinafter*

provided." In paragraph (b) it is then provided that "as to *each piece of property,* other than land," there shall be reported in detail "the original cost to date, the cost of reproduction new, the cost of reproduction less depreciation * * *." It is clear that these "cost values" are to be determined for all the property included in the detailed inventory, and obviously Congress did not intend to require a report of the cost of reproduction of, or depreciation in, intangible property.

The reason for directing that only the physical property be classified in accordance with the classification of "expenditures for road and equipment" is that there are included in "original cost" and "cost of reproduction new" many expenditures which are not attributable to any particular items of physical property. These include, among others, engineering costs, organization and incorporation expenses, law expenses, stationery and printing, and interest during construction. An inventory of the property for purposes of stating original cost or cost of reproduction new would be incomplete which did not provide somewhere for these necessary costs. In the accounting classification a separate "account" is provided for each of these items. The Act, however, expressly authorizes the Commission to depart from the classification in reporting these costs, and it has become the common practice both by the Commission and carriers in making their inventories to

lump most of the items and show them as a percentage figure of the cost of the physical property, without attempting to determine the precise amount which should be recorded under each of the various accounts provided in the classification.

Subsection (b), after specifically requiring a report on original cost to date, cost of reproduction new, and cost of reproduction less depreciation, referred to in the section as the three "cost values," provides as follows:

> The Commission shall in like manner ascertain and report separately other values, and elements of value, if any, of the property of such common carrier, and an analysis of the methods of valuation employed, and of the reasons for any difference between any such value and each of the foregoing cost values.

Nothing in this language directs that every incorporeal right of a common carrier is to be separately and specifically valued. The language is a recognition that having obtained the three so-called "cost values," the physical property of the carrier, because of other elements of value which inhere in it, may have a different value from that derived solely by consideration of the three cost values; but it is still only another value *of the property* that is to be found.

Congress carefully refrained from specifying any other value or element of value that must be found by the Commission or from asserting that

any other value existed, but expressly left it open to the Commission to report a value of the physical property of the common carrier different from either of the three cost values and inclusive of any element of value which the Commission should find reposed in the physical property.

From this wording of the Act it is evident that Congress had in mind the decision in *Smyth* v. *Ames,* 169 U. S. 466, 547, wherein this Court, after enumerating certain elements of value to be considered in arriving at a value for rate-making purposes, carefully stated:

> We do not say that there may not be other matters to be regarded in estimating the value of the property.

In conforming its legislation to the law of the land as thus stated, Congress authorized the reporting of any other factors which might affect value, but it did not require the ascertainment of the value of every incorporeal right.

A carrier's contract rights to run its trains into the terminals of other carriers, its traffic arrangements with its connecting carriers, and its various other contractual rights incident to its operations may go to make a carrier a successful operating concern and may justify a statement of a value different from either of the "three cost values." The Commission has recognized this in its decisions in respect to "Going Value" as shown by its decision in *San Pedro, Los Angeles & Salt Lake R. R. Co.,* 75 I. C. C. 463, on page 512, where it stated:

> All of the values of an intangible nature which inhere in the property of the carrier as a going concern successfully operating a railroad and which we can ascertain and measure, and to which we can ascribe a money value we have ascertained and reported. To the extent that we have found or the courts have said that there is a value or an element of value in any intangible right, privilege, or advantage which the carrier asserts that it enjoys, we have endeavored to give weight thereto, even though we could not assign a separate, definite money value to it.

But such rights do not constitute physical property and are not required under the plain language of the Act or by a reasonable interpretation thereof to be "inventoried" and the value thereof specifically determined.

The requirements of paragraph (b) Second, for the reporting of "the original cost of all lands, rights of way, and terminals owned or used for the purposes of a common carrier" and "the present value of the same" have likewise been fully performed. Nothing in this language expressly requires the separate valuation of an incorporeal right to operate over the tracks or into the terminals on lands or rights of way of another carrier.

It is true that the term "right of way" is sometimes used to describe the intangible right to cross the land of another, but the more ordinary and accepted use in railroad parlance is to describe the

strip of land which railroads take upon which to construct their roadbeds. (54 C. J. 824.)

This Court in holding that the grant of a "right of way" conveyed more than the intangible right of crossing and covered the rights to take possession of land for the purpose of establishing tracks thereon said (*Georgia* v. *Cincinnati So. Ry.*, 248 U. S. 26, 28):

> A grant of the use of a right of way is the grant of a right of way in the ordinary meaning of words * * *.

The "right of way" which the Commission is required here to value is the strip of land occupied by the Central's tracks and not the intangible right to run trains over those tracks held by the New Haven.

Commission's method of valuation of property permissively used under trackage rights reasonable and meets the requirements of the Act.—That the provision of the Act directing the valuation of "all the property owned or used" required administrative interpretation before the Act could be enforced is best evidenced by a recital of conflicting claims which were adduced at the very commencement of the valuation work as to the proper treatment to be accorded property owned and operated by one carrier but used under trackage rights by another.

Some carriers contended that they "used" the property over which their trains ran, and that the Act was mandatory in requiring the valuation of such property to them. Others contended that the right of use in such tracks was "property" owned

and used and should be valued over and above the physical property. On the contrary, the owning carriers contended that since they both owned and used their own property, and that a part of such use was to permit other carriers to run trains thereover upon payment of rental, the entire property should be valued to them as the owners and users thereof.

Likewise, operating carriers owning equipment used in accordance with common railroad practice by many other carriers contended that this letting of their equipment on a per diem rental was only a part of their use of their own equipment, and that consequently, the same should be valued wholly to them as "owned and used."

The Commission found there were in existence many thousands of instances of "joint facilities" which are facilities of many kinds, owned, maintained, and operated by a particular carrier, but the use of which is shared by one or more carriers under contracts giving them restricted rights in the use thereof generally upon the payment of a rental in proportion to the use made. A terminal, such as the Boston Terminal, operated and maintained by the owning company, collecting from the carriers which enter it with their trains rentals in proportion to the use made thereof, represents a typical instance of a "joint facility."

It was essential that the Commission in the commencement of its valuation work determine by whom the "property" in such instances was

"owned" and by whom it was "used" within the meaning of the Act. Turning to the Act for guidance, it found the general requirement to value "all the property owned or used" by every common carrier, but it looked in vain for specific, positive instructions as to the method to be pursued in inventorying and classifying such property. Discussing the problems in an appendix to its first valuation decision, wherein it announced its rules and methods which should be observed in all valuation cases, it said (*Texas Midland Railroad, supra,* pp. 122, 123):

> Ordinarily carrier property is inventoried in the name of the owner; that is, the details are shown in the inventory of the owner and not elsewhere. In case of jointly owned property the details would appear in the inventory of each owner.
>
> Where property is owned by one carrier and exclusively used by another carrier the details would appear in the inventory of the owner, but the total amount would be shown in the inventory of the user as property used by that carrier. (R. 388.)
>
> * * * * *
>
> It often happens that a carrier which owns and uses its property gives to some other carrier a qualified use in that property in common with itself. Such use is generally denominated a trackage right, and is the right to use the tracks of the owner for a compensation usually varying with the extent of the use. (R. 389.)

In the absence of what is deemed to be any specific direction in the Act for the treatment to be accorded to property subject to "trackage rights," it announced a method which it thought to be reasonable and to meet the requirements of the Act as to the valuation of "all the property" (p. 21, R. 392):

> Where property is owned by a common carrier and is used by it jointly with another carrier or carriers for common-carrier purposes, the property is included in detail in the inventory of the owning carrier and reference is made to the use by the other carrier or carriers. The extent and terms of the use appear also in the inventory of the using carrier or carriers.
>
> It has been our endeavor to adopt a method with respect to this class of property which will permit of reporting the three cost values for all property used for common-carrier purposes without duplication. When it is borne in mind that many railroads are not operated exclusively by their owners, but that certain portions thereof are used by one or more carriers by virtue of trackage rights, etc., it is apparent that duplication of values for such jointly used property will result unless a proper course of procedure is pursued. The necessity of securing reproduction new and reproduction less depreciation values without duplication is manifest, since these values must necessarily be considered as factors entering into the determination of an ultimate value of railroad property.

As a further explanation of its method and its reasons therefor, the Commission, in the body of its report in the *Texas Midland Case* (p. 24, R. 396), said:

> When the valuation work has been completed for all the railroads in the United States, the Commission, the Congress, and the public will be informed with respect to every piece of property used in serving the public, with the single exception of that insignificant portion which is privately owned and partially used by common carriers. The inventories of the individual carriers will contain the cost values in detail with respect to property owned; the cost values in detail for property exclusively used by them but owned by a non-carrier; total cost values for property exclusively used by them but owned by a common carrier; a description of the terms and use of jointly used property of others with a reference to the report of the owning carrier for details in regard thereto; and a description of the terms and use of jointly used property owned by them with a reference to the reports of the using carrier or carriers for details in regard thereto. All the property used in serving the public will be inventoried and valued, and will be inventoried and valued once and only once. There will be and should be no duplications.

After a careful consideration of the problems in the light of the statutory requirements and pur-

poses, the Commission announced these rules, methods, and principles to be followed with respect to the valuation of property subject to trackage rights, and concluded (R. 390), "It is believed that the method adopted fully complies with the statute."

The foregoing explanation is set out at some length in order to show that the Commission has not disregarded the statute, but seeking to enforce it, and looking in vain for specific directions to guide it in the valuation of property subject to trackage rights, and finding it necessary to interpret and administer the Act, adopted and announced a principle of valuation in respect to such property which it deemed to be in harmony with the purposes of the Act and in accordance with the intention of Congress and which it found to reach a reasonable and proper result.

The New Haven has apparently recognized the inconsistency of asking for a specific valuation of the right of use over and above the value of the physical property and does not seek to have the Act construed as requiring this. It has not contended that its rights constitute an intangible element of value which the Commission has failed to report. It concedes that the Commission has valued "all the property" comprising the terminals (R. 425, 429), but it asserts that it is a joint owner of the physical properties and that an undivided portion thereof representing its "ownership" and

measured by its proportionate use of the property on valuation date should be inventoried and specifically valued to it (R. 10, 22–23).

The Commission upon the evidence submitted to it decided that the New Haven had no joint ownership, and the merits of this question are hereinafter considered. For present purposes it is only desired to emphasize the wholly unreasonable result of interpreting the Act to require an apportionment to holders of trackage rights of the physical property over which they operate.

The New Haven incurred no "original cost" in connection with the construction of the property, has no investment therein and would not, upon any reasonable theory of reproduction, have to reproduce it. It has not nor can it issue securities covering the physical property. The extent of its use varies from day to day, and it pays rental only to the extent that it cares to and does make use of the property. Its "undivided interest" if measured by the extent of its use would be a constantly varying joint ownership. Its rental payments, as hereinafter shown, are by mandatory provisions of law charged as in the nature of operating expenses.

A carrier is unquestionably entitled to earn from rates an amount sufficient to pay all operating expenses and in addition a fair return on the value of its property if it can do so without exacting unreasonable rates; but to allow it to receive a return on the value of property provided by another and, at the same time, require it to charge to operating

expenses rentals for the use of that property, results in the public paying and such carrier receiving a double return on that "property." This would reward with a double return on property the carrier which uses the property of others under trackage rights and by comparison penalize with a single return the carrier which acquires the use of property through investment in the ownership thereof.

By the proposed treatment, the Central (including the Harlem), which paid the entire cost of the New York property, issued the original securities therefor and must pay interest thereon, would as of valuation date be deprived of portions of the property for security-issuing purposes, varying from 24 per cent for certain sections to 62.95 per cent for others. (R. 60–61.)

The Boston terminal, likewise, which has constructed and operates a terminal and has issued securities for the construction thereof, all in accordance with the authority contained in its charter, would have its entire value apportioned to the several carriers entering it and would itself be wholly without value for the purpose of issuing securities.

To assign to the New Haven in its valuation a substantial portion of the physical property over which it operates for the payment of a toll would be improper, we submit, whether that value be one for rate-making, security-issuing, or purchase and sale purposes. The intention to positively require

the Commission to so treat it for valuation purposes should not be attributed to Congress in the absence of the most specific language requiring it.

Legislative approval in Sec. 15a of the Commission's valuation of property subject to trackage rights.—In the Transportation Act of 1920 there was included what is now known as Sec. 15a of the Interstate Commerce Act, by which Congress directs the Commission to establish rates so that carriers may earn a *net railway operating income* equal as nearly as may be to a *fair return* on the aggregate value of their railway property. Values found under Sec. 19a, it is declared, "shall be deemed by the Commission to be" the values to be used for determining such aggregate value. In subparagraph (1) Congress defined the term *"net railway operating income"* to mean *"railway operating income, including in the computation thereof debits and credits arising from equipment rents and joint facility rents."* The terms "railway operating income" and "joint facility rents" had well-known and accepted meanings. Under the accounting classifications made pursuant to statutory authority, prevailing for many years, "joint facility rents" are defined as follows:

> This account shall include amounts payable accrued as rent for tracks, yards, terminals, and other facilities owned or controlled by other carriers, companies, or individuals, and in the joint use of which the accounting company participates.

Under this accepted definition rentals paid by the New Haven for the use of the New York and Boston terminal properties by the mandatory provisions of Sec. 15a are required to be and have been charged by it as "joint-facility rents" and are deducted from revenues in the same manner as operating expenses in determining net railway-operating income. This results from a positive requirement of the statute, not of the Commission.

The effect of the definition of net railway-operating income in Sec. 15a is to declare that in determining the fair returns for rate-making and recapture purposes, rentals paid for joint facilities shall be considered an operating expense and along with other operating expenses be deducted from gross income before determining whether the net income received by a carrier represents a fair return on the value of its property.

From the foregoing it is evident that in enacting Sec. 15a Congress knew of the Commission's decision not to include in the 19a valuation of a carrier any part of the physical property used by it under a joint facility rental arrangement and approved of this treatment. It recognized the practical difficulty of attempting to apportion to users of equipment and joint facilities a portion of the value of such property measured by the extent of use, which constantly varied. Accordingly in directing the use of 19a values for rate-making purposes it enacted an accounting regulation designed

to harmonize the fair net returns which it proposed to allow carriers with the Commission's valuation methods by requiring joint-facility rents paid to be an operating expense. By this method it provided in a more appropriate place a means for carriers to obtain a full return on the property over which they operated under such arrangements. Thus, under the Commission's valuation methods, together with the congressional definition of "net railway operating income," the New Haven is permitted to earn enough to pay all operating expenses, *including rental for the Boston and New York properties,* and in addition a return equal to 6 per cent upon the value of other property which it operates for railroad purposes. If the Commission should be required to include in the New Haven's value a portion of the value of the terminal property, a clear duplication of return in favor of the New Haven would result, in that the same items of property would both add to its aggregate value and at the same time decrease the amount of its net railway operating income by the amount of the rental paid for its joint use.

In respect to the Central, the amount of rent received by it from the New Haven, by legislative mandate, is added to and included as a part of its "net railway operating income," and unless this income is permitted to reach 6 per cent upon the entire value of the New York terminal properties, the Central is denied a fair return on all its property. Under the method adopted by the Commission and

approved, and adapted by Congress to its plan for rate-making purposes, there is no duplication to the owning carrier, to the jointly using licensee, or to the public.

The distinction between property held under lease and under trackage rights is not an artificial one made by the Commission for accounting convenience but has full legal recognition. (Elliott on Railroads, 3rd Ed. Vol. I, § 514, p. 748.)

In *Roosa* v. *Brooklyn Heights R. R. Co.*, 28 Misc. 387, 388, the Supreme Court of New York said:

> In the one contract, that for the use, we have the parties thereto using in common the road or the part thereof embraced therein, the parties operating their cars respectively over the same, the possession, however, remaining in the owner, while in the other, the lease, the lessee has, subject only to the limitations, restrictions and conditions therein contained, the absolute and exclusive use, enjoyment and possession of the demised property, operating the road of the lessor corporation in the same manner that the owner would but for such lease, and that is the case here.

The Commission values *leased* property to the using carrier. The rentals paid for property held under lease are not treated as an operating expense in the Commission's accounting regulations and Congress did not require such treatment in Sec. 15a. Only in instances such as joint facilities used under trackage rights, and equipment interchanged

among several using carriers, where it is impracticable to apportion the value among the several "users," did Congress require the rentals to be charged to operating expenses. This confirms the conclusion that Congress approved the Commission's valuation methods.

In the case of the Boston terminal property it is significant that in the legislative enactment providing the arrangement by which that property was to be constructed and operated it was also expressly provided that the rentals paid by the using company should be charged by it to operating expenses.

Discretion expressly conferred to prescribe form of valuation report.—After being directed to value "all the property owned or used by every common carrier," the Commission is expressly given broad authority in respect to the methods to be adopted and the form in which the value of "all the property" shall be submitted. Sec. 19a provides:

> (e) * * * all rules and regulations made by the Commission for the purpose of administering * * * this section * * * shall have the full force and effect of law.

And in subsection (c) it is further provided:

> Except as herein otherwise provided, the Commission *shall have power to prescribe* * * * *the form in which the results of the valuation shall be submitted,*

> and the classification of the elements that constitute the ascertained value, * * *. (Italics ours.)

This language clearly indicates that Congress did not pretend to foresee nor attempt to specifically provide the methods to be pursued in reporting and classifying property used under every conceivable arrangement. It therefore, by express language, wisely left to the Commission the formulation of methods for the classification, reporting, and valuation of the same. The Commission having *valued all the property* is merely acting within express authority in choosing the manner in which property subject to trackage rights shall be classified and the value thereof reported to Congress.

Administrative interpretation of the Act entitled to weight.—The principles announced by the Commission for the valuation of trackage rights have been consistently followed by the Commission in all its valuation decisions up to and including the last decision reported. *Delaware L. & W. R. Co.*, I. C. C. Val. Rep., Vol. 39, 1, 19. It has completed its primary valuations, issuing more than one thousand reports which it has made and, in accordance with the requirements of law, annually reported to Congress since it decided the *Texas Midland Case*, in 1918. During that interval Congress has amended the valuation section of the Interstate Commerce Act (42 Stat. 624), and while it has made changes therein in respect to other matters it has

in no way indicated Congressional disapproval of the Commission's interpretation of the requirements of the Act in respect to valuation of property permissively used by virtue of trackage rights. It is a well-settled principle of law that an administrative interpretation of a statute which has long been adhered to is entitled to great weight in construing such act. *United States* v. *Moore,* 95 U. S. 760, 763; *Hastings and Dakota R. R. Co.* v. *Whitney,* 132 U. S. 357, 366; *Logan* v. *Davis,* 233 U. S. 613, 627.

Not only has Congress in its amendment to Sec. 19a failed to indicate any disapproval of the Commission's construction of the Act, but in enacting Sec. 15a, it directed the Commission's findings of value fixed under Sec. 19a as of the appropriate date to be used without alteration for rate making and thereby through the strongest inference *approved* of the Commission's methods and interpretation.

The applicable principle of law is well stated in *25 R. C. L.,* pp. 1043, 1045, 1046:

> The weight to be given to executive or departmental practice is increased when the legislature, in reenacting the law or another law in pari materia, fails to indicate in any way its disapproval of the settled construction of the officer or department, or where an implied approval of such construction may otherwise be deduced from subsequent legislation, or failure to alter the practice by legislation.

During this long period of consistent administrative interpretation and up to the conclusion of its task of making the primary valuations, no court has required the Commission to alter its methods of reporting the value of property used under trackage rights, although the attempt has been made in mandamus proceedings to require the Commission to do substantially, in our opinion, what the New Haven here seeks.

In *United States ex rel. Kansas City Southern Ry. Co. et al.* v. *Interstate Commerce Commission, supra* (June 1, 1925), the Kansas City Southern in a petition for mandamus alleged that the Commission had failed to perform the explicit ministerial duty under Sec. 19a of reporting the value of "all the property owned or used" by it. Its petition alleged that by virtue of its one-twelfth stock ownership in and its contractual right for 200 years to operate its trains into the Kansas City terminal, it was possessed of an equitable ownership therein which the Commission was required to value to it. The Court of Appeals of the District of Columbia declined to require the Commission to specifically value the carriers "right and interest in certain specified properties, to wit, the Kansas City Terminal Railway Company" (p. 693).

This Court on application for certiorari refused to review that decision. (269 U. S. 570.)

Practically all operating carriers, to greater or less extent, have rights of use in property owned and

operated by other common carriers. The principles governing the classification for valuation purposes of such property must be the same whether the property involved be of major or minor importance. The Commission's interpretation which it has consistently followed for many years, which has received the implied approval of Congress, and which the Court of Appeals in 1925 found to violate no explicit requirement of the Act, should not now be reversed at the conclusion of the primary valuation work where, as we have undertaken to show, such interpretation meets the reasonable requirements of the law and complies with the apparent legislative intent.

II

The Commission acted within a proper authority and in accordance with the intent of Congress in stating its ascertained values to be for rate-making purposes, and is under no positive command of the Act to state a different value

In its first valuation decision announced in 1918 the question arose as to whether the Act required the Commission to state a single sum as the value of the property owned or used for common-carrier purposes. (*Texas Midland Case, supra,* pp. 5–6.) In the face of conflicting contentions by the parties to the proceedings, it concluded:

> * * * While it may be questioned whether or not the Act *requires* the finding of a single sum as the value of the property, we are of the opinion that it *authorizes*

> the finding of such value for purposes under the Act to regulate commerce, and it is our purpose ultimately to make such finding as to each property. * * * (Italics ours.)

In its decision published at that time it observed that it had reported all the matters specifically required to be reported and had shown all the basic facts upon which a judgment could be formed as to the sum to be found as value for the purposes of the Act; and that it would ultimately report such judgment value in the particular case.

Prior to the announcement of a single-sum value for any carrier, the Transportation Act of 1920 was passed, making further reference to valuations under Sec. 19a and, as heretofore noted, requiring the use of values finally ascertained thereunder for rate-making and recapture purposes.

In its final valuation of *San Pedro, Los Angeles & Salt Lake R. R. Co., supra,* 504, decided June 7, 1923, the Commission noted the positive requirements in Sec. 15a of a value for rate-making purposes, as well as the other possible purposes under the Transportation Act for which values might be required, and observed that the value of the property of a common carrier could not be said to be the same for all purposes, irrespective of the use to be made of that value.

It concluded that while the Act did not in terms require the finding of a single-sum value, it authorized such finding, and that the single-sum value

which it should report is the value for rate-making purposes.

In all its subsequent decisions, including that of the New Haven, the Commission has stated the single-sum values found to be those for rate-making purposes. In respect to the New Haven's rights to participate in the use of the property held and operated by other carriers, it held that it was not required to state a specific value of such rights as a part of its value for rate-making purposes. (R. 64, 67.)

Throughout the litigation the New Haven has contended that the Commission is without authority to state a value for any particular purpose but is under a peremptory duty to state a value which should not be "any different value from the actual pecuniary or economic value which would be placed upon it in ordinary commercial transactions." (Brief Ct. of Apps., p. 48.)

In its decision, the Court of Appeals, while expressly declining to say that the Commission's single-sum value was an improper one for rate-making purposes, has held that the Act is mandatory in requiring the Commission to state a valuation other than for rate-making purposes, suitable for use "for any and all purposes specified in the Act." (R. 651.)

In *The Minnesota Rate Cases,* 230 U. S. 352, this Court clearly indicated that in testing the value of a carrier's property for rate-making purposes, the value to be used should not be based upon the

returns from rates in existence. By contrast, in a purchase case a carrier's earnings under an existing schedule of rates constitute unquestionably one of the most important elements to be considered.

In the *Missouri Rate Cases,* 230 U. S. 474, an attempt was made to use, as a basis in determining valuations for rate purposes, valuations which had been determined and used for taxation purposes. In this connection this Court, speaking through Mr. Justice Hughes, said at page 498:

> Nor was it shown that these valuations, made by them for the purposes of taxation, were upon a basis which could properly be taken in determining the fair value, where the sufficiency of prescribed rates is involved and the issue is one of confiscation.

In *Galveston Elec. Co.* v. *Galveston,* 258 U. S. 388, this Court, in distinguishing between elements to be considered in fixing different values, said, at pages 396–397:

> In determining the value of a business as between buyer and seller, the goodwill and earning power due to effective organization are often more important elements than tangible property. Where the public acquires the business, compensation must be made for these, at least under some circumstances. *Omaha* v. *Omaha Water Co.,* 218, U. S. 180, 202, 203; *National Waterworks Co.* v. *Kansas City,* 62 Fed. 853, 865. And they, like past losses, should be considered in determining whether a rate charged by a public

> utility is reasonable. Compare *Venner Co.* v. *Urbana Waterworks,* 174 Fed. 348, 352. But in determining whether a rate is confiscatory, goodwill and franchise value were excluded from the base value in *Cedar Rapids Gas Light Co.* v. *Cedar Rapids,* 223 U. S. 655, 669, and *Des Moines Gas Co.* v. *Des Moines,* 238 U. S. 153, 169; and the expressions in *Denver* v. *Denver Union Water Co.,* 246 U. S. 178, 184, 191, and in *Lincoln Gas & Electric Light Co.* v. *Lincoln,* 250 U. S. 256, 267, are not to be taken as modifying in any respect the rule there declared. Going concern value and development cost, in the sense in which the master used these terms, are not to be included in the base value for the purpose of determining whether a rate is confiscatory.

In *St. Louis & O'Fallon Railway Company et al.,* v. *United States et al.,* 279 U. S. 461, 487, this Court said:

> In the exercise of its proper function this Court has declared the law of the land concerning valuation for rate-making purposes.

The foregoing extracts indicate, we think, that the courts have recognized a distinction between the methods to be followed and the elements to be considered in fixing the value of common-carrier property for rate-making purposes on the one hand, and in valuing the property for purchase purposes on the other. The Valuation Act itself recognizes a distinction between value for rate-

making purposes and value for other purposes when it requires in paragraph "(b) Third" that the Commission show separately the property held for purposes other than those of a common carrier.

The value to be used in a rate-making case has been customarily referred to by the courts as the "fair value" or the "reasonable value."

In *Smyth* v. *Ames, supra,* 546, this Court said:

> We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public.

In *San Diego Land & Town Co.* v. *Jasper,* 189 U. S. 439, Mr. Justice Holmes said, at page 442:

> The main object of attack is the valuation of the plant. It no longer is open to dispute that under the Constitution "what the company is entitled to demand, in order that it may have just compensation, is a fair return upon the reasonable value of the property at the time it is being used for the public."

In *Spring Val. Water Works* v. *City, etc., of San Francisco,* 192 Fed. 137, 154–155, the District Judge used the following pertinent language:

> It is impossible to consider the constant use of the word "fair" or the word "reasonable," in connection with value, by all the Federal courts and the courts of this State in practically every recent statement of this

> rule, without feeling that regard must be given to the service performed by the property; that reasonable value and fair value are not always and under all conditions the precise equivalent of full actual value, or the value which would be awarded in condemnation proceedings; that the value upon which a fair return is due is the value which under all the circumstances is reasonable and fair as between the public and the person who has voluntarily devoted his property, or some portion or use thereof, to public convenience.

In the light of the clearly recognized distinction between value for rate-making purposes, and value for other purposes, and in view of the apparent impossibility of stating a single-sum value which might be used for every conceivable purpose, the Commission concluded to exercise what it thought to be its *authority* to report a value for rate-making purposes.

Sec. 19a, as hereinbefore observed, is specific in requiring the Commission to report what are designated as the three "cost values" of property, namely, original cost, cost of reproduction new, and cost of reproduction less depreciation, in requiring a statement of the "present value" of lands, and of other matters. That it contemplated that the Commission, from a consideration of these and other elements, should ascertain and state a value of the property and authorized it to do so is indicated by the language of subsection (c) wherein the Commission is given power "Except as

herein otherwise provided" to prescribe "the form in which the results of the valuation shall be submitted and the classification of the elements that constitute the ascertained value * * *."

Nowhere does it specify all the elements to be considered in this ascertained value and nowhere does it state the purpose for which the ascertained value shall be used. The naming of some of the matters to be considered in fixing the value and the failure to name others is reasonably to be attributed to the thought expressed in the following excerpt from Report No. 1290, pages 5 and 8, of the Senate Committee on Interstate Commerce, Sixty-second Congress, third session, in which Senator La Follette for the Committee explained to the Senate the purposes of different provisions of the bill which became the Valuation Act.

> Your committee recommends striking out the first five paragraphs of the House bill, which in some respects are indefinite and uncertain and deal with some matters not properly within the scope of a bill designed to provide for a valuatiton of the several classes of property of carriers subject to the act to regulate commerce. In lieu thereof the committee proposes certain amendments which it believes essential to enable the commission to secure every element of the value of the property of the common carriers, so classified and analyzed as to enable the commission and the courts to determine the fair value of such property for rate-making purposes.

> The courts from the first have used various terms descriptive of the values and elements of value to be determined as a basis for ascertaining the fair value of railway property. Some of these terms they have altogether rejected. Others have come to have an accepted meaning and significance by commissions and courts and are recognized as covering all the elements of value attaching to the property of common carriers for rate-making purposes.
>
> * * * * *
>
> Especially as to intangible values, the commissions and the courts are in a transition period. The elements of value which will finally constitute fair value for rate-making purposes are steadily narrowing. They are not expanding.

The legislation evidences the intention of Congress to require specific findings as to the three "cost values" clearly known to be necessary in ascertaining value, leaving it open to the Commission to find a value different from any of them based upon a consideration of such other elements, if any, as may be proper to be considered for rate-making purposes.

The Valuation Act in paragraph (i) provides that all final valuations by the Commission shall be "prima facie evidence of the value of the property in all proceedings" under the Act to regulate commerce as of the date of the fixing thereof, and in all "judicial proceedings for the enforcement of the Act" or brought to enjoin and set aside any order

of the Commission. At the time of the enactment of the Valuation Act, March 1, 1913, the only orders which the Commission made and the only proceedings before it in which valuation was a factor were those involving rates. A valuation for rate-making purposes, therefore, met all the requirements of the Act and fell within the evident intention of Congress in enacting the same.

This is made further evident by reference to the foregoing excerpts from the report of the Senate Committee, where the chairman specifically stated that the committee was proposing amendments which would empower the Commission to secure all the elements of value of the property of common carriers necessary to enable it to determine a fair value of such property for *rate-making purposes*.

By the Transportation Act of 1920 Congress made amendments to the Interstate Commerce Act, the most important of which were the rate-making and recapture provisions contained in Sec. 422, now known as Sec. 15a of the Act. In this section Congress again dealt with the subject of valuation and prescribed and specified a purpose for which valuations made under Sec. 19a shall be used. In paragraph (2) it provided:

> In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or terri-

> tories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: * * *.

In paragraph (4) it is provided:

> For the purposes of this section, such aggregate value of the property of the carriers shall be determined by the Commission from time to time and as often as may be necessary. The Commission may utilize the results of its investigation under section 19a of this Act, in so far as deemed by it available, and shall give due consideration to all the elements of value recognized by the law of the land *for rate-making purposes,* and shall give to the property investment account of the carriers only that consideration which under such law it is entitled to in establishing values *for rate-making purposes. Whenever pursuant to section 19a of this Act the value of the railway property of any carrier held for and used in the service of transportation has been finally ascertained, the value so ascertained shall be deemed by the Commission to be the value thereof for the purpose of determining such aggregate value.* (Italics ours.)

Likewise in paragraph (6), the value of individual carriers for excess-income purposes is declared to be that found under the same provision.

This positive instruction to the Commission, in the absence of completed final 19a valuations, to give due consideration to all the elements of value recognized by the law of the land for rate-making purposes, coupled with the express declaration immediately following that once the valuations of individual carriers have been finally ascertained under Sec. 19a as of appropriate dates, such values *shall be deemed to be the values thereof* for the purpose of computing aggregate value, amounts to a legislative direction to the Commission, that its final values shall be determined in such manner and upon consideration of such elements that they may properly be used for rate-making purposes.

In its decision, the Court of Appeals has stated: "We must not be understood as holding that the valuation of the New Haven property fixed by the Commission is not a proper valuation for rate-making purposes." (R. 651.) But it held that since the valuations required by the statute were subject to use for other purposes than rate making, the value to be ascertained should not be one for rate-making purposes, and it recites other purposes under the Transportation Act for which valuations might be required.

The court has neglected to observe, we respectfully submit, that whereas valuations made under

Sec. 19a for general purposes under the Act are only *prima facie* evidence of such values and may be corrected in the proceedings if found to be inappropriate for the particular use (*United States* v. *Los Angeles R. R.*, 273 U. S. 299), in respect to rate-making and recapture under Sec. 15a, the 19a valuations fixed as of appropriate dates are positively required to be used without alteration.

It is not apparent, moreover, as appears to be assumed by the Court of Appeals, that valuations for rate-making purposes would be inappropriate evidence of the value for the other purposes under the Act, including all those mentioned by the court. So far as valuation is taken into consideration in prescribing divisions of joint rates it would seem that rate-making values would be most proper to be used.

Although not so expressly provided in the Act, valuation is undoubtedly a factor to be considered in approving the issuance of securities under Sec. 20a. A properly ascertained valuation for rate-making purposes may be a proper factor to be considered in determining the issuance of securities. It may not be the only factor so far as valuation is concerned and to the extent that it may be inappropriate for use in any case, it may be supplemented, since a valuation under Sec. 19a is only *prima facie* evidence before the Commission of the value of property for that purpose.

It is pertinent to observe, moreover, that a remarkable result is achieved in this case if, as

implied by the court, a portion of the value of the New York and Boston property must be inventoried and valued to the New Haven for security-issuance purposes. The original investment for the construction of the Grand Central Terminal was incurred wholly by the Central system and it issued bonds to provide funds therefor; upon any reasonable theory of reproduction the Central and not the New Haven would incur the cost of construction and issue the securities therefor. The New Haven can not sell or assign its trackage rights. (R. 601.) The holders of securities issued by the New Haven would have no recourse to sell either physical or nonphysical rights in the Central's property. It is not reasonable, therefore, that for security-issuance purposes a portion of the physical value of these properties should be assigned to the New Haven.

The court likewise refers to the provision in Sec. 5 of the Act, adopting a plan of consolidation of railroad properties and prescribing in paragraph (6) (b) that "The value of the properties sought to be consolidated shall be ascertained by the Commission under section 19a of this Act, * * *" and that the securities at par "shall not exceed the value of its consolidated properties as determined by the Commission." Whether these requirements strictly limit the issuance of securities under consolidations to the final single-sum values as ascertained by the Commission under Sec. 19a, without

consideration of other factors, such as ownership of noncarrier property, is highly doubtful, to say the least, and not necessarily to be decided here. Even assuming that such limitation applies, however, it must be said that Congress being annually informed as to the Commission's valuations knew that they were made for rate-making purposes and there may be many good reasons why it was thought desirable to limit securities upon consolidation of railroad properties to the values so ascertained.

The only occasion for which Congress has plainly and unequivocally provided that final values when fixed under Sec. 19a as of appropriate dates shall be used *without alteration* is in respect to rate making and recapture under Sec. 15a.

The foregoing is submitted as showing that the Commission clearly acted within its authority in stating a single-sum value for rate-making purposes, and in so doing met the purposes of the legislation which were clearly evident.

In this proceeding, however, the precise question is not whether the Commission exceeded its authority in reporting a rate-making value, but whether in the report of its valuation it has failed to perform some ministerial duty clearly commanded by the Act.

It has been shown, we think, that "all the property owned or used" within the proper meaning of those words has been valued. Those things which

are specifically required to be reported are shown in the report, as well as those facts and factors not specifically required, but which were thought to have a bearing on value. The report includes the three "cost values"; the original cost and present value of lands, rights of way, and terminals; the history and organization of the present and any previous corporations operating the property; the changes in security issues in any reorganizations; the net and gross earnings; the value of aids, gifts, or grants; the original cost and value of noncarrier property; the amount of working capital and material and supplies; the terminals used; traffic connections; economic conditions relating to traffic; the results of corporate operations; the investment in road and equipment; the investments in other companies and the status of holdings on valuation date; and many other matters. This comprehensive report is not limited in the elements and factors included to those properly to be considered in reaching a value for rate-making purposes. If in any proceeding the value required for a purpose under the Act should be such as to render the single-sum value for rate-making purposes inappropriate, the valuation, upon the basic facts found in the report, can be modified and corrected. But the Act does not contain in any specific language a command to report another or a different value.

In *United States ex rel. Kansas City Southern Ry. Co. et al.* v. *Interstate Commerce Commission,*

supra, the petitioners objected to the finding of a value for rate-making purposes and as stated by the court (p. 693):

> * * * prayed for a writ of mandamus, directing and requiring the Commission (a) to investigate, ascertain, and report the true, economic value of said properties; * * *.

The Court of Appeals of the District of Columbia, considering that the Act did not specifically require the statement of a value other than for rate-making purposes, declined to reqiure the Commission to alter its valuation.

That decision, we believe, was correct and is applicable in the present case.

III

In an action for Mandamus, the courts of the District of Columbia may not review the Commission's classification of the New Haven's rights as "important trackage rights" and determine that such rights constitute "estates" in the physical properties of other carriers not parties to the action

It has been shown that "the face of the statute" requires the ascertainment of values for "property owned or used by every common carrier" but not the value of the *use* and that, under the Commission's reasonable interpretation of the statutory purposes, property *jointly used* under arrangements not amounting to a *joint ownership* of the property itself should be inventoried and valued to the owning carrier with appropriate notation con-

cerning the joint use in the valuation of both carriers.

The New Haven concedes that the terminal properties have been fully valued. (R. 425, 429.) The "nonaction of the Commission" against which the writ is sought is the Commission's alleged failure to find that the New Haven has a joint ownership in the properties in question. (Brief in Opposition to Petition for Certiorari, pp. 18, 19, 20–21.) The petition seeks to have the determined value of these terminal properties "properly apportioned" (R. 10), alleging "an estate in perpetuity, the legal equivalent of an estate in fee simple, in the tracks * * * from Woodlawn to Forty-third Street and in the Grand Central Terminal" and "a perpetual franchise" to use the Harlem's tracks and the Boston Terminal property (R. 22).

The precise issue of a joint ownership fully decided by the Commission.—Pursuant to the provisions of Sec. 19a (h) and (i), the Commission accorded to the New Haven a full hearing. Thereafter it published its final valuation of the New Haven's property as of June 30, 1915, in a report and order dated November 13, 1929. (Ex. 1 to the petition, R. 24–388.) The order recited that the New Haven had no property "jointly owned and used, except minor facilities," and classified the New Haven's "rights of use" under "*Jointly used property*" as "important trackage rights." (R. 76.) In Appendix 2, referred to in the order, the

New Haven's rights were fully described, as were the terms of its joint use. (R. 275, 276.)

In its opinion the Commission discussed the New Haven's contentions, analyzed the evidence, and determined that such rights did not constitute any *joint ownership* in the physical properties to be classified and valued under the Act. (R. 60–67.)

In respect of the New Haven's right to use the Harlem's tracks, the Commission stated (R. 63–64):

> It argues that this is not an ordinary trackage right but an estate in the property.
>
> * * * * *
>
> There is nothing expressly stated in the agreement which gives to the carrier or its predecessor a *part ownership* in the property, nor is there any expression which may reasonably be construed as giving to the carrier an interest beyond that right to use on consideration of the payment of a full compensation. On the contrary, as set out above, it is expressly stated that the agreement is a *contract of transportation* wherein full compensation is paid for the right to use the property jointly with the owning carrier. * * * (Italics ours.)

And in respect of the New Haven's right to use the Grand Central Terminal the Commission said (R. 65–66):

> The carrier contends that it is the owner and user of an undivided interest in the

> Grand Central Terminal property, Fifty-ninth Street to Forty-second Street.
>
> * * * * *
>
> There is no provision by which the carrier can acquire an *interest in the fee* or an indefeasible title to any or all of the property other than that of a cotenant or joint user as defined by the agreement. The carrier does not own an interest that would cause it to suffer loss by deflation or to profit by the enhancement of value which might take from or add to the intrinsic worth of the property used. (Italics ours.)

Concerning the carrier's contentions in respect of the Boston Terminal, the Commission notes that this terminal is "owned and used by The Boston Terminal Company" and sustained the omission of a value for the New Haven's use as in accord with previous decisions and its finding with respect to the Grand Central Terminal. (R. 67.)

The Commission is neither constituted nor organized to adjudicate and define with all the precision and nicety of description required by the common law the exact nature of the rights or interest held by carriers in the properties of other carriers over which they operate. It is not its function to try intricate questions of title to property as between carriers. Its duty under Sec. 19a is primarily to value all the property of all the carriers and properly classify it for valuation purposes.

The Commission fully performed its duty in respect of the properties in question when it once

fully valued all the properties and fully determined from the evidence before it that the New Haven's "rights of use" were "important trackage rights" (R. 76) and did not amount to *joint ownership* in the properties owned and used by other carriers (R. 64, 66, 76). Considering that it had fully valued all property under the Act the Commission, therefore, said of the New Haven's right to operate over the Harlem's tracks (R. 64–65):

> * * * we are of the opinion that no specific sum should be found for the carrier's *right* to use these tracks. It is therefore not necessary for us to determine whether the right of use in the carrier is *best* defined by reference to it as a license to use, an easement, or a trackage right. * * * it is distinguished only by its magnitude from the many other *similar rights of carriers to the joint use of property wholly owned by other carriers.* (Italics ours.)

Since it found that the New Haven's rights of use did not constitute any joint ownership in the properties themselves, the Commission followed the method of valuation established in *Texas Midland Railroad, supra,* and in its valuation as of June 30, 1917, of the New York Central system (including the Central's controlled lessor, the Harlem) inventoried and valued therein all of the Grand Central Terminal and its approaches. (R. 425, 429.) In this report the New Haven's terminal or track-

age rights are referred to as appears in the margin hereof.[1] (I. C. C. Val. Rep. vol. 27, 1, 303–304.)

[1] *Solely leased, but jointly used*

Owned by the New York and Harlem, used with:	Rentals
The New York, New Haven, and Hartford Railroad Company—	
Grand Central Terminal at Forty-second Street, offices, tracks, and facilities within the terminal zone at New York, N. Y.; for the term of charters from Mar. 17, 1848, under agreement of that date between the New York and Harlem and The New York and New Haven Railroad Company, which agreement was assigned on Apr. 1, 1873, to The New York Central and Hudson River Railroad Company; stipulated payment a proportion, on basis of cars handled, of 4.25 per cent per annum on valuation of $53,991,628.17, maintenance, operation, and taxes	$1,641,187.28
Passenger station at One hundred and twenty-fifth Street, New York, N. Y.; for indefinite period from Jan. 1, 1915, terminable on 30 days' notice; stipulated payment a proportion, on basis of number of trains stopped at station, of $66,000 per annum	10,598.82
Tracks, 11.94 miles, from Grand Central Station, New York to Woodlawn, N. Y.; for the term of charters from Mar. 17, 1848; stipulated payment 12.21 cents for each full-paid passenger, 4.07 cents for each commuter passenger, and 40 per cent of the receipts from mail, express, and excess baggage; three-fifths credited to maintenance and operation and two-fifths to income	556,529.04
Yard track facilities at Mott Haven Yard, N. Y., for indefinite period from July 24, 1907, terminable on one year's notice; stipulated payment a proportion, on basis of cars handled, of 4.25 per cent per annum on valuation of $2,234,919.55, maintenance, operation, and taxes	50,846.68

In like manner the Commission inventoried and valued all of the Boston Terminal property in its valuation as of June 30, 1915, of the Boston Terminal Company (R. 425, 429) with similar reference to the New Haven's terminal or trackage rights (103 I. C. C. 707, 730).

Mandamus not the appropriate remedy.—The Court of Appeals, considering the instruments granting the rights and the New Haven's allegations that such rights constituted estates in the properties, found that the New Haven's rights "were in the nature of a perpetual easement in the Harlem road," that the New York legislature had "impressed in perpetuity a dominant servitude upon the property of its own corporation, the Harlem" (R. 643), "that the New Haven has a base fee in the undivided half of the railroad terminal and its approaches" (R. 646), and that looking through "the corporate shell of the terminal company" the New Haven could be seen as one of the "real owners" (R. 648) whose property rights to be valued were its "*ownership* and perpetual right of use * * * in the terminal tracks and station" (R. 649).

These findings by the Court of Appeals amount, as we read them, to the determination of questions of title to property in which the Central, the Harlem, and the Boston Terminal have interests and rights necessarily involved.

The issue of joint ownership or the possession of owners' estates in these several properties may

sometime arise between the carriers holding the record title to the properties and the New Haven. It is respectfully submitted that such issue should not be determined in a mandamus action in which the carriers most interested are not parties and have no opportunity to be heard. Mandamus is not the appropriate remedy to adjudicate questions of title to property (38 C. J. 589, 923), and especially is this true where the rights of third parties are involved (38 C. J. 854, 923). See also *United States ex rel. Redfield* v. *Windom,* 137 U. S. 636, 644.

Aside from such considerations, however, the Court of Appeals, as we read its decision on this issue, has fallen into a repetition of the error which this Court pointed out in *Interstate Commerce Commission* v. *Waste Merchants Association, etc.,* 260 U. S. 32. In that case this Court said (pp. 34–35):

> Petitioners sought in the proceeding to set aside the adverse decision of the Commission on the merits and to compel a decicision in their favor. The Court of Appeals granted the writ. This was error. Mandamus can not be had to compel a particular exercise of judgment or discretion, *Riverside Oil Co.* v. *Hitchcock,* 190 U. S. 316; *Ness* v. *Fischer,* 223 U. S. 683; *Hall* v. *Payne,* 254 U. S. 343; or be used as a writ of error, *Commissioner of Patents* v. *Whiteley,* 4 Wall. 522. The case at bar is not like *Interstate Commerce Commission* v. *Hum-*

> *boldt S. S. Co.*, 224 U. S. 474, and *Louisville Cement Co.* v. *Interstate Commerce Commission*, 246 U. S. 638, where the Commission had wrongly held that it did not have jurisdiction to adjudicate the controversy; nor is it like *Kansas City Southern Ry. Co.* v. *Interstate Commerce Commission*, 252 U. S. 178, where the Commission wrongly refused to perform a specific, peremptory duty prescribed by Congress.

In holding that mandamus was the proper remedy in this case, the Court of Appeals said (R. 653):

> We think this case is controlled by the decision in *Kansas City Southern Ry. Co.* v. *Interstate Commerce Commission*, 252 U. S. 178.

That case arose out of paragraph (*b*) Second of Sec. 19a, which, as originally enacted, required the Commission to find and report in respect of lands *inter alia*, "separately the original and present cost of condemnation and damages or of purchase in excess of such original cost or present value." These words were repealed by Act of June 7, 1922.

Prior to the repeal the Commission, relying on the impossibility of making a rational determination in a matter so inherently speculative, and notwithstanding said plain and explicit language, in its valuation of the Kansas City Southern Railway Company, refused to hear proof concerning said "excess costs." The carrier sought a writ of mandamus and the case eventually reached this Court.

Examining the "face of the statute" and the "nonaction of the Commission in a matter purely ministerial" this Court properly directed that the writ issue to compel the Commission to hear the proof and act upon it.

It, however, has been clearly shown that in the instant case "the duty is not thus plainly prescribed, but depends upon a statute * * * the construction or application of which is not free from doubt" and therefore involves a "discretion which can not be controlled by mandamus." *Wilbur* v. *United States, supra,* 219.

Chief Justice Wheat concluded that "the Commission did not err" but he stated (R. 449):

> Even if it did, it is at least gravely doubtful whether this Court has the power by mandamus to require it to correct the error. (Citing *United States ex rel. Kansas City Southern Ry. Co.* v. *Interstate Commerce Commission, supra.*)

In that completely parallel case the Court of Appeals, on June 1, 1925, affirmed a judgment of the Supreme Court of the District of Columbia dismissing the carrier's petition for mandamus seeking to require the Commission to report "the economic or exchange value" instead of "a so-called rate-making value" and to report the original cost, the costs of reproduction, and "the value" of its "right and interest" in The Kansas City Terminal Railway Company.

The Court of Appeals, speaking through Mr. Chief Justice Martin, said (p. 694):

> The reports of the Commission are brought by reference into the record. They disclose that each of these objections, *including the reference to properties alleged to have been omitted,* was presented to the Commission by the appellants, and was fully investigated, considered, and passed upon by it. * * *
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> * * * * *
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> * * * it is manifest that the Commission fully assumed and exercised the authority or jurisdiction imposed upon it by the act, and that the real complaint of the appellants is, not that the Commission refused to consider the points in question, but that it considered them and thereupon decided them erroneously. The real relief sought by the appellants, accordingly, is that the valuation reported by the Commission be set aside, and other valuations ordered. This clearly brings the case within the well-established rule that the action of mandamus cannot be used as a substitute for an appeal, nor as a writ of error. (Italics ours.) (Certiorari denied, 269 U. S. 570.)

We read the foregoing decision, which this Court refused to review upon a petition for certiorari, as plainly holding that Sec. 19a of the Act contains no provision which could be construed as explicitly commanding the Commission to find a value other than for rate-making purposes, nor any explicitly

directing the Commission to inventory or value rights of use held by one carrier in property owned and used by another common carrier.

The Court of Appeals distinguished this former decision with the statement (R. 652):

> There the commission valued all the property of the carrier; here it refused to value certain of the property.

Inasmuch as the Kansas City Southern's rights to operate its trains into the Kansas City terminal were in essential respects similar to the rights of the New Haven to operate its trains into the New York and Boston terminals, and inasmuch as the Commission pursued the same methods of valuation in both cases, we read the decision in the present case as wholly in conflict with its former correctly reasoned decision.

The former case being heard upon a motion to dismiss, the facts stated in the petition, for the purpose of the decision, were taken as true. The petition alleged that the Commission had held it would separately value the property of the Kansas City Terminal Railway Company and had failed and refused to include in the inventory or single-sum value of the petitioner's property anything to represent its interest or right of use therein, and that the petitioner with eleven other railroads owned all the stock of the Terminal Company and had entered into contracts to use its property for a period of 200 years upon the payment of rental sufficient

to pay operating and maintenance expenses and interest on its securities, the entire rental to be apportioned among the several using carriers in proportion to the extent to which each made use of the facilities. The petition stated:

> The Terminal Company is, in substance, a joint agency of each of the twelve constituent lines in the performance of its freight and passenger service in Kansas City, Missouri. Each is the equitable *owner* of one-twelfth of the terminal property. (Italics ours.)

Since the New Haven's petition for the writ of mandamus, together with its attached Exhibits Nos. 1, 2 and 3, clearly shows on its face that the Commission in the instant case also fully exercised its jurisdiction under the Act, we respectfully submit that the Court of Appeals was in error in reversing in this action the Commission's decision made upon full consideration of the facts and the law respecting the New Haven's contentions to joint ownership and rights of use in the physical properties of other carriers also subject to the Act.

The decision of the Court of Appeals, holding that the New Haven enjoys an undivided ownership in the several properties, reverses the Commission's decision not only in the New Haven valuation but prior decisions made in the valuation of the New York Central System (including the Harlem) and the valuation of the Boston Terminal Company. This issue of the classification of the property for

valuation under Sec. 19a was a matter specifically within the jurisdiction of the Commission and necessarily decided by it in each of the three valuations mentioned.

The decision of the Court of Appeals as to the Boston Terminal property is also read by us to be in conflict with a decision of the Circuit Court of Appeals (First Circuit) in *Boston Terminal Company* v. *Gill,* 246 Fed. 664, hereinafter discussed on page 99.

The Court of Appeals, as a basis for its conclusion that this case should be controlled by this Court's decision in *Kansas City So. Ry.* v. *Int. Com. Comm., supra,* rather than by its own prior decision in *United States ex rel. Kansas City Southern Ry. Co. et al.* v. *Interstate Commerce Commission, supra,* quoted the comment of this Court in *United States* v. *Los Angeles R. R., supra,* 310. The pertinent part of the quoted comment is (R. 654–655):

> "In directing the commission to investigate the value of the property of the several carriers, Congress prescribed in detail the subjects on which findings should be made * * * and the carrier, being a party in interest, has the remedy by mandamus to compel the commission to make a finding on each of the subjects specifically prescribed. Kansas City Southern Ry. Co. v. Interstate Commerce Commission, 252 U. S. 178."

The Los Angeles & Salt Lake R. R. Company brought an action to annul an order of the Com-

mission determining the final value of the carrier's property under Sec. 19a of the Act. It alleged various errors committed, including the omission of property and the erroneous finding of a value for rate-making purposes. The District Court issued an order annulling the final valuation. *Los Angeles & Salt Lake Railroad* v. *United States,* 4 Fed. (2d) 736; 8 Fed. (2d) 747. On appeal, this Court declined to consider whether the charges made in the bill were well founded and ordered it dismissed.

It pointed out that final valuations were made by the Commission in the "exercise solely of the function of investigation," and operated to deprive the carrier of no property or right. It observed that conceivably errors may occur in each of the 1,800 valuations to be made which would never be of legal significance unless the valuations were used as evidence in some proceeding before the Commission or a court, and it concluded (273 U. S. 312):

> Congress has provided adequate remedies for the correction of errors in the final valuation and the classification thereof. The conclusions reached by the Commission must be submitted first in the form of a tentative report, § 19a, pars. (f) and (h). When so submitted, the carrier is authorized to file a protest and to be heard thereon, par. (i). * * * When the final report is introduced in evidence the opportunity to contest the correctness of the findings therein made

> is fully preserved to the carrier; and any error therein may be corrected at the trial. Specific findings may be excluded because of errors committed in making them.

It therefore held (pp. 311, 314):

> * * * Congress did not confer upon the courts power either to direct what this "tribunal * * *" * * * shall find, or to annul the report, because of errors committed in making it.
>
> * * * * *
>
> Its conclusions, if erroneous in law, may be disregarded.

If the proper classification of property for valuation purposes requires the Commission to adjudicate the many intricate questions of title which rest in the varying agreements for use of property as between carriers, and if its valuations prior to their use for any purpose are subject to court review for erroneous decisions on such questions, the result is that innumerable questions of title will be brought into litigation when no real dispute exists between the interested parties and when the valuations involved may never be used in evidence for any purpose.

It is submitted that the New Haven's allegations of injury herein are of anticipated injuries (R. 23), and, if well founded, relate to errors such as may be corrected when and if the valuation is used in evidence. Prior to such use they are not properly to be corrected either by mandamus or proceeding in equity.

In *United States ex rel. Ness* v. *Fisher,* 223 U. S. 683, this Court, quoting with approval from *Riverside Oil Co.* v. *Hitchcock,* 190 U. S. 316, 325, said (page 694):

> "* * * The writ never can be used as a substitute for a writ of error. Nor does the fact that no writ of error will lie in such a case as this, by which to review the judgment of the Secretary, furnish any foundation for the claim that mandamus may therefore be awarded. * * *"

It is submitted, therefore, that the Commission fully performed its *ministerial* duty under Sec. 19a in respect of the New Haven's property when it fully inventoried and valued all the property owned or used by it under lease from the other respondents, together with all intangible elements of value inhering therein and that it fully performed its *ministerial* duty in respect to the terminal properties over which the New Haven enjoys trackage rights when it fully valued said properties to the Central (including the Harlem) and the Boston Terminal with proper notation of the rights.

It is submitted also that in interpreting Sec. 19a—"a statute * * * the construction or application of which is not free from doubt"—and in deciding that the New Haven's "rights of use" should be classified as "important trackage rights," the Commission exercised a "discretion which can not be controlled by mandamus." (*Wilbur* v. *United States, supra,* 219.)

IV

The New Haven, by the grants of trackage rights, did not obtain a joint ownership in the physical properties and the Court of Appeals, by construction, has read into the grants conveyances not intended by the parties

During all stages of this litigation, it has been earnestly contended, on behalf of the Commission, that it fully performed its ministerial functions when it exercised its jurisdiction and determined that the New Haven's rights to operate into the terminal properties did not constitute an estate or joint ownership therein but represented "trackage rights" only; and that this determination, even if erroneous, is not subject to review in a mandamus proceeding.

If we are correct in this view of the matter, it should not be necessary to enter into a discussion as to the correctness of the Commission's determination. Nevertheless, the Court of Appeals examined into the nature of the rights and has, in our view, reversed the Commission's decision and instructed it as to how this issue should be decided.

In this situation, without in any way waiving the contention that the issue is not one to be determined by the court in this proceeding, we deem it necessary to present the reasons why, in our opinion, the Court of Appeals has erred in holding that the New Haven has an estate in the physical properties in question.

The New Haven has no record title to any part of the terminal property which is the subject of

this controversy. The record title to all the rights in public domain, the rights of way, the lands and the tracks, tunnels, overhead bridges, etc., between Woodlawn and Forty-second Street and to the terminal buildings erected thereon by the Central, is partly in the Central and partly in its lessor, the Harlem. The record title to all the rights in public domain, rights of way, lands, tracks, and structures in the South Station and its approaches at Boston is in the Boston Terminal Company. The owning companies have borrowed money on the strength of their title to these properties and have bonds outstanding secured by the properties.

The Commission, after considering the instruments granting the New Haven's rights, arrived at the conclusion that the New Haven's rights did not constitute any joint ownership or estate in the properties (R. 64, 66), and classified the New Haven's rights in its order as "important trackage rights" (R. 76).

In stating the reasons for its decision (R. 64, 66), the Commission noted that the New Haven had no investment in the properties, and that it bore no expense of the maintenance of the Harlem's tracks, and that the rent paid is chargeable to joint-facility rents directed to be taken into account and deducted as an expense in determining net railway-operating income under Sec. 15a.

The Supreme Court of the District, after consideration of the several instruments and the oral evidence of the New Haven, arrived at the conclusion

that the New Haven's rights to use the tracks of the Harlem were mer 'y trackage rights (R. 445), and that its rights to use the Grand Central Station were of the same general nature as its trackage rights over the Harlem's tracks (R. 447). In view of the general agreement of the parties that the treatment to be accorded the New Haven's right to use the Boston Terminal would be governed by the treatment accorded its rights to use the New York terminal (R. 67 and 401), no special consideration was given to the Boston situation (R. 449).

In arriving at his conclusion concerning the nature of the New Haven's rights, Chief Justice Wheat, after pointing out that counsel for the New Haven contended "that its rights constitute an actual estate in the property itself, to be carved out of the fee simple estate, that in truth it is an owner using its own property, not the user of another's property," stated: "The applicable principle seems to me to be that stated in *Union Pacific Ry. Co.* v. *Chicago, Rock Island & Pacific Ry. Co.*, * * *." (R. 442–443.) He carefully analyzed that case in the following language (R. 443–444):

> * * * That case arose out of a contract between the Union Pacific and the Rock Island Companies, by which the Union Pacific let the Rock Island Company "into the full, equal and joint possession and use of its main and passing tracks, now located and established, or which may be hereafter located and established," between certain points. Within a comparatively short time,

the Union Pacific Company attempted to repudiate the contract as *ultra vires*, one of its claims being that by the contract it had disabled itself from performing the duties imposed upon it by its charter, since the instrument was a lease and railroad leases had been denounced as *ultra vires* in *Thomas* v. *Railroad Company*, 101 U. S. 71; *Pennsylvania Railroad Co.* v. *St. Louis, Alton &c. Railroad*, 118 U. S. 290, and other cases.

The Rock Island Company brought an action against the Union Pacific for specific performance. The case was tried in the Circuit Court by Mr. Justice Brewer, who decided in favor of the Rock Island Company, upholding the contract, 47 Fed. 15. His decision was affirmed in the Circuit Court of Appeals, 10 U. S. App. 98, and by the Supreme Court of the United States, 163 U. S. 564. The decision of the case depended upon the nature of the contract and of the rights granted by it. In considering the nature of the contract, Mr. Chief Justice Fuller, delivering the opinion of the Court, after referring to the fact that in several places the instrument is called a "lease" and the parties are called "lessor" and "lessee," and pointing out that what it was styled by the parties did not determine its character, but that the Court was required to examine the entire contract, the relations of the parties, their connection with the subject matter, the circumstances under which it was signed, said at page 582:

"The contract provided that the Pacific Company hereby 'lets the Rock Island Com-

pany into the full, equal and joint possession and use of its main and passing tracks.' The possession here spoken of was such possession as the Rock Island Company would have when its engines, cars and trains were running over the tracks. The company had no possession before its trains came on the tracks or after they had run off of them, and while its trains were on the tracks its possession was only of the particular part occupied temporarily while running over them. Moreover, all trains were to be moved under the direction of an officer of the Pacific Company. The Rock Island trains coming upon a Pacific track immediately passed from the control of the Rock Island Company into that of the Pacific, and its officials were subjected to the orders of the Pacific's officers. And throughout the whole contract there does not appear to be a single provision which looks to any actual possession by the Rock Island of any of the Pacific property beyond that which was involved in its trains being run over the tracks under the direction of the other company. The contract in this regard was really an agreement for trackage rights, for running arranements, a 'terminal contract' with compensation on a 'mileage' or 'wheelage basis,' rather than a lease."

And at page 589: "* * * By the contract the Pacific Company parted with no franchise, and was not excluded from any part of its property or the full enjoyment of it. What it agreed to do was to let the

> Rock Island into such use of the bridge and tracks as it did not need for its own purposes. This did not alien any property or right necessary to the discharge of its public obligations and duties, but simply widened the extent of the use of its property for the same purposes for which that property was acquired, to its own profit so far as that use was concerned, and in the furtherance of the demands of a wise public policy."
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> Mr. Justice Brewer in his opinion in the Circuit Court, 47 Fed. 15, 23, said of the contract:
>
> "* * * While the Rock Island is let into possession and use, the Pacific is not put out of possession and use. There is no surrender of the exclusive use of any portion of the Pacific's line. It remains in the undisturbed possession of every mile of its track; can operate all its trains, and discharge all the duties which it owes to the government or the public. A different question would arise if it had attempted by this instrument to dispose of the full possession of the same length of its track."

And we submit that a careful reading of the grants here involved in the light of that decision will disclose that Chief Justice Wheat correctly applied the principle in that case as his measure of the nature of the New Haven's rights when he concluded (R. 445):

> The same reasoning applied to the present case leads, I believe, to the conclusion that the New Haven's rights in the tracks of the

Harlem are no different in kind from those which the Rock Island had in the tracks of the Union Pacific Company. The language in the one is no broader than that in the other. The purposes, uses, and objects were identical, and, as pointed out, by the Supreme Court, 163 U. S. 584, such contracts are frequently made between railroad companies. See also *Brooklyn Crosstown R. R. Co.* v. *City R. R. Co.*, 51 Hun. 600; *Coney Island R. R. Co.* v. *Brooklyn Cable Co.*, 53 Hun. 169.

The grant of trackage rights over the Harlem's tracks.—The introduction of the first paragraph of the contract of 1848 (Ex. 7, R. 520) between the Harlem and the New Haven states its subject matter. The words "THIS AGREEMENT AND CONTRACT OF TRANSPORTATION" show, at the very outset, that the contract grants no joint ownership of physical property. The words of the grant are contained in the fourth paragraph of the contract, which reads that the New Haven (R. 520)—

> * * * shall have the *right to run* their trains, engines, and cars for the transportation of passengers, mails, expresses, freight, etc., *over the track or tracks of the road of the New York and Harlaem Railroad Company from the point of junction aforesaid to and into the city of New York,* * * * the said New York and New Haven Company furnishing their own haulage (Italics ours.)

Under the law of New York at the time of the Harlem's grant of trackage rights to the New Haven, title to real property could be conveyed only by deed under seal containing appropriate words of grant, or by will, or by the judgment of a court of competent jurisdiction. *Kent's Commentaries,* Volume IV, 491; *Long Island Railroad Co.* v. *Conklin,* 29 N. Y. 572, 584.

In these words of the contract there is no conveyance of land or structures; in them there is no grant of a right given the New Haven to construct tracks or structures upon the Harlem's right of way; the words import simply a *permission* to move its trains over the railroad of the Harlem between the junction and the City of New York with its own haulage.

The New Haven's agreement is to pay the Harlem "as full compensation for the use and occupation of their track or tracks as aforesaid, a certain sum for each passenger transported" (R. 521), and a division of the amounts actually received for the transportation of mails, express, and freight (R. 522–523).

The New Haven does not pay for an estate; it agrees to pay for its *permissive use* according to its actual exercise of the *permission.* And no words in the contract of 1848 obligate it to use the Harlem's tracks. The agreement is like that which was before the Circuit Court of Appeals in *Grand Trunk W. Ry. Co. et al.* v. *Chicago & E. I. R. Co.,* 141 Fed. 785. In that case suit was brought by several railroads having rights to use the tracks of the

Chicago & Western Indiana Railroad Company against the Chicago & Eastern Illinois Railroad Company, which enjoyed similar rights, to enjoin the latter from diverting its passenger trains from the tracks and Dearborn Street station of the Chicago & Western Indiana to the La Salle Street station of another carrier.

The rights of the Chicago & Eastern Illinois were held under a number of "leases" in which the Chicago & Western Indiana "granted, demised, and leased" to it for 999 years rights of use. The compensation was that proportion of interest, maintenance, etc., which its wheelage bore to the total wheelage of all users.

The Chicago & Eastern Illinois, claiming that its agreement amounted only to a trackage agreement and vested in it no estate and that it acquired under the agreements and leases the right to use the tracks and terminals or not, as it should from time to time see fit, answered that it violated no obligation assumed by it under the leases by diverting its passenger business to the La Salle Street station. (141 Fed. 794.)

The Court recited that careful scrutiny of the various leases and agreements revealed *no covenant to use but merely covenants to pay for use* (pp. 795–6, 798–9). Obligations to pay interest on bonds provided for in some of the agreements were referred to as the obligations of stockholders and not covenants of lessees (p. 797). In the so-called

"original lease" of 1879, the Western Indiana "granted, demised and leased" to the Eastern Illinois for 999 years "the right and privilege of using and running locomotives, cars, and other rolling stock * * * over and upon the main track or tracks of the railroad of the party of the first part * * * from its junction with the road of the party of the second part, at or near Dolton * * * to the passenger depot of the said party of the first part in the city of Chicago" (p. 786). Of this lease the Court said (p. 798):

> It may be greatly doubted whether this "original lease," so-called, was other than a mere operating agreement as to what is termed the "common property." *Union Pacific Railway Co.* v. *Chicago, Rock Island & Pacific Railway Co.*, 163 U. S. 564. * * * it was therein stipulated that it should have the mere right to use in common; *and such right to use without obligation to use* is found in every subsequent agreement between it and the Western Indiana Company. This is strong to show, if it be not absolutely convincing that the Eastern Illinois Company did not contract to assume an obligation to use for that long period of time; that it kept itself free to use these privileges or not, as its interests might dictate, stipulating to pay for such use as it made of them. (Italics ours.)

Paragraph (10) of the tripartite agreement of 1907 recognizes the New Haven's rights to cease or

diminish its use of the Harlem's tracks as its ingress to the terminal. (R. 602.) And in this connection it is noted that the original track of the Harlem at the time of the contract of 1848 extended to Canal Street (City Hall). In 1857 its line was shortened to Twenty-seventh Street, and in 1872 its passenger depot was changed to Forty-second Street, its present location. The contract of 1848 also provided for freight traffic, but for many years past the New Haven has operated only passenger trains south of Woodlawn, and those only to Forty-second Street.

Paragraph seventh of the 401-year lease reserved certain horse-car lines to the Harlem subject to trackage rights of the New Haven and the Central (R. 566), and paragraph ninth assigned to the Central (R. 567–568) the contract with the New Haven, except the New Haven's rights to operate below Forty-second Street over the said horse-car tracks (now leased to the New York Railways Co., I. C. C. Val. Rep. Vol. 27, 1, 133, 441, 461). Both the New Haven and the Central long ago ceased to exercise their rights to operate south of Forty-second Street.

The grant of terminal rights in Grand Central.—The "Tripartite Lease" of November 1, 1872, under which the Harlem constructed the old Grand Central depot at Forty-second Street and leased its use to the Central and the New Haven jointly with itself, also provided for the leasing of certain parts

of the depot to each of the grantees for their exclusive use. (Exhibit 10, R. 532.) This lease is no longer in effect. It was superseded and terminated by the "Tripartite Agreement" of July 24, 1907. (Ex. 13, Paragraph 23; R. 608.) The New Haven's privilege of using the Grand Central Terminal, therefore, is dependent upon the grant contained in the tripartite agreement of 1907. In this agreement the Central, "acting for itself and the Harlem, * * * does demise, let, and lease" to the New Haven, for a prescribed compensation, "*the use, in common with the Central,*" of the Grand Central Terminal and certain yards and appurtenances to the electric operation of trains, with a further provision that the New Haven's "*right to the use thereof* shall in no event exceed fifty (50) per centum of the maximum capacity of said Railroad Terminal or of any part thereof." (R. 593, 595.)

In these words there is no conveyance of land or structures; in these words there is no grant of joint ownership or the exclusive possession of any part of the land and structures; the grant is solely of a privilege of the "use in common."

The New Haven does not pay for an estate; it agrees to pay as compensation for its "use in common" that proportion of 4¼ per cent interest on the cost of construction and of expenses for maintenance and operation which its use bears to the entire use determined by counting the cars and

engines entering the terminal. (R. 595–600.) Except for the obligation to pay $160,179.92, representing a proportion of interest upon the capitalized cost of the old Grand Central Depot (part of which it had exclusively used), the New Haven need make no payment if it operates no trains into the terminal. (R. 475, 596.)

The act of the New York legislature.—By act of May 11, 1846 (Ex. 5, R. 510), the New Haven was permitted and authorized to construct and operate a railroad in New York, but its location was specifically confined to a line from the New York-Connecticut state line to point of connection with the Harlem at or near Williams Bridge (Woodlawn).

The New Haven's efforts to secure authority to extend its railroad from the state line into New York City had failed. (R. 457.) The New Haven had, however, obtained a reciprocal contract with the Harlem permitting it to operate over the tracks of that company into New York City (Ex. 4, R. 506), but the Harlem had intimated that it did not intend to fulfill its contract (R. 459). The New Haven's Board of Directors, after obtaining opinion of counsel, on February 15, 1848, authorized its President to pray for "Legislative sanctions to said contract." (R. 531.)

Thereafter the contract of March 17, 1848 (Ex. 7, R. 520), was signed and the act of March 29, 1848 (Ex. 8, R. 529), was its "legislative sanctions." This act does not impress a "dominant servitude"

on the property of the Harlem; it permits the New Haven to accept and use *permissive rights to* operate over the Harlem's tracks beyond the junction point to which it had been authorized to build and operate by the act of May 11, 1846. This *permissive franchise to operate* over the Harlem's tracks into the city of New York is limited to the New Haven's operating only "upon such terms and to such point as has been or may hereafter be agreed upon" by the two companies. (R. 530.)

The words of this act convey no ownership in the Harlem's physical property to the New Haven; these words grant the New Haven no part of the Harlem's right of way; the words of the act merely authorize and permit the New Haven to operate over the Harlem's tracks *if the Harlem agrees.* These words also authorize and permit the Harlem *to agree* to an arrangement which otherwise might have been questioned as *ultra vires.* 51 C. J. 767–768 (R. 445).

In *Union P. R. R. Co.* v. *Mason City & F. D. R. Co.,* 222 U. S. 237, this Court had before it again the question of the joint use of the bridge of the Union Pacific which had been in question in *Union Pacific R. Co.* v. *Chicago R. I. & P. R. Co., supra;* this time in relation to the Act of Congress providing the "means to construct the bridge" upon condition that other railroads be admitted to its use (p. 249). Speaking of the Act the Court said (247–248):

> The * * * act * * * provided that "all trains of all roads terminating at said

> river, at or opposite said point, shall be allowed to cross said bridge for reasonable compensation."
>
> * * * * *
>
> It [the Act] bridged the river—"the transportation gap" * * *. It did no more. It did not intend to give to other roads a right in the terminal of the Union Pacific Company beyond what was *necessary for a right of passage over the "gap"*, giving the same continuity to other roads which the Union Pacific Company had.
>
> * * * * *
>
> It gave only what the Chief Justice, in 163 U. S., called "running rights." (Italics ours.)

And at page 250 the Court added:

> The rights asserted transcend anything given by the bridge Act. The tracks of the Union Pacific Company, as urged by its counsel, *are its property,* * * *. (Italics ours.)

The New Haven's claim that its construction of this legislation was confirmed by the act of May 7, 1903 (Ex. 12, R. 582), has been well answered in the analysis of the latter act by Chief Justice Wheat, wherein he clearly shows that said act recognizes the New Haven as having merely a permissive use. (R. 445–447.) (Cf. Laws of New York, 1904, chap. 639.)

If the act of March 29, 1848, were capable of the construction placed upon it by the Court of Appeals, it would be an unconstitutional taking of the

Harlem's property without due process or just compensation. The constitution of the State of New York, 1846, contains the following provisions:

> Section 6, article 1: * * * Nor shall private property be taken for public use without just compensation.
>
> Section 7, article 1: When private property shall be taken for any public use, the compensation to be made therefor, when such compensation is not made by the state, shall be ascertained by a jury, or by not less than three commissioners appointed by a court of record as shall be prescribed by law. * * *.

The grant of terminal rights in Boston.—The New Haven's right to use the Boston property is obtained by virtue of Chapter 516, laws of Massachusetts, 1896 (Ex. 16, R. 615), under which the Boston Terminal Company was chartered "*to construct* and *maintain* a union passenger station * * * and to *provide* and *operate* adequate terminal facilities for the several railroad companies * * * and for the accommodation of the public * * *." It is therein provided that the compensation to be made by the companies using the terminal "shall be deemed a part of their operating expenses," and these payments are proportioned to the use made of the terminal. (R. 621.)

The New Haven admits in its reply that the Boston Terminal Company owns and operates the Boston Terminal property. (R. 429.) Notwithstanding this admission, the Court of Appeals finds

in its opinion that "The Terminal Corporation as such, assumed no liability either in construction, maintenance, operation, or otherwise," and that the Court would therefore look "through the corporate shell of the Terminal Company" to see "the real owners, the railway companies" (R. 648), and it held that the rights of the New Haven to be valued were "the ownership and perpetual right of use" in the terminal property (R. 649).

This decision of the Court of Appeals is read by us to be in conflict with *Boston Terminal Company* v. *Gill, supra,* in which the United States Circuit Court of Appeals for the First Circuit affirmed and upheld a decision of the United States District Court that the Boston Terminal Company is a corporation organized for profit and engaged in the business of owning and operating its terminal in Boston for profit so as to render it liable for an excise tax of the United States. To the same effect is *Houston Belt & Terminal Ry. Co.* v. *United States,* 250 Fed. 1.

The corporations insisted that they were not so organized or engaged in business and that the business conducted on the property was that of the individual railroads using their terminals.

Since the Boston Terminal Company sold bonds secured by its property to obtain the money to construct the terminal, since it actually constructed and maintains that terminal, since its business of permitting the railroad companies to operate their trains over its property is the operating of a termi-

nal in the only manner in which a terminal company can operate, and since it is a common carrier under the Act, we submit that the Court of Appeals should not have undertaken to hold that the Boston Terminal "assumed no liability either in construction, maintenance, operation, or otherwise." It is also submitted that the New Haven's right to use the South Station is of the same nature as its trackage and terminal rights in New York. (R. 67, 401, 449, 647.)

Practical construction by the parties.—As pointed out by this Court in *Union Pacific R. Co.* v. *Chicago, R. I. & P. R. Co., supra,* 584, contracts for trackage rights are "frequently" made between railroad companies. The Circuit Court of Appeals in *Chicago G. W. Ry.* v. *Northern Pac. Ry. Co.,* 101 Fed. 792, has similarly observed that contracts between railroads similar to the one in suit are not uncommon and the obligations of the companies entering into them are commonly well understood (p. 793).

Like the present controversy, this case involved a trackage agreement, and in construing the contract the Court said (pp. 795–796):

> It is a canon in the interpretation of contracts that the practice of the parties under them may furnish a solid basis on which their construction may rest.
>
> "Tell me," says Lord Chancellor Sudgen, "what you have done under a deed, and I will tell you what that deed means."
>
> * * * * *

> There is in this case no inconsistency between the terms of the contract and the practice of the parties under it.
>
> * * * * *
>
> The contract related to a subject-matter peculiarly within the knowledge of all the contracting parties, and they, better than any one else, knew the duties and obligations it imposed on them, respectively; and having agreed in placing the same construction on its words or its implications—and it is immaterial which—for such a long period and *that construction harmonizing with the provisions of the contract, and certainly not being inconsistent with anything contained therein, it is now too late for one of the parties, or the court, to change it.* (Italics ours.)

See also *Central Trust Co. of New York et al.* v. *Wabash, St. L. & P. Ry. Co. et al.*, 34 Fed. 254, 257–258.

The original Act to regulate commerce, passed February 4, 1887, created the Interstate Commerce Commission and required sworn annual reports from carriers concerning their accounts and their operations. The New Haven filed its first report in response to this law for the year 1888. (Ex. No. 17, R. 631.) In each report to and including the last one filed before this suit was instituted (Ex. No. 20, R. 636), the New Haven reported to the Commission its operations of the property in dispute under "Class (5)," "Line operated under

trackage rights," which the printed instructions of the report explain as follows:

> Class (5) includes all tracks operated and maintained by others but over which the respondent has the right to operate some or all of its trains. *In the road of this class the respondent has no proprietary rights but only the rights of a licensee.* (Italics ours.)

This long continued practical interpretation under oath by officials of the New Haven should receive greater weight than the controversial one recently placed thereon by its counsel.

Especially is this true where the New Haven made similar classification of its rights in its reports to its own stockholders (Ex's. 21–22, R. 636–637) and where, in reporting its use of the tracks, the New Haven had a choice of several classifications in the forms arranged by the Commission.

If the New Haven believed throughout these years that it was a *joint owner,* it could have scheduled its joint operation under "Class (1)," "Line owned by Respondent." The Commission's instructions are specific to this effect:

> Road held by the respondent as *joint or common owner* or a *joint lessee* or under *any joint arrangement* should be shown in its appropriate class and the entry of length should be of the entire length of the portion jointly held. The class symbol should have the letter (*J*) attached, and full particulars showing all of the *joint or common title*

> *holders and the extent of their respective interests should be shown in a memorandum attached to the schedule.* * * * (Italics partly ours, Exhibit 20, R. 636.)

It is inconceivable that the Central would spend millions of dollars for improvements on the Harlem's line from Woodlawn to and including the terminal if one-half of every dollar so spent were an outright gift to the New Haven; it is equally inconceivable the New Haven would pay a rental (R. 426–427) for the use of property in which it enjoys a joint ownership.

In *Chicago G. W. Ry.* v. *Northern Pac. Ry. Co., supra,* the Circuit Court of Appeals considered the obligations of the parties to such contracts for joint use of tracks, saying (p. 793):

> Contracts between railroad companies similar to the one in suit are not uncommon, and the obligations of the companies entering into them are commonly well understood. While such contracts provide for the *joint use* of the railroad track, it is *obvious* that the several companies can not each have its own time-table, train master, tower men, operators, and the like for regulating the movement of its trains over the joint track. The regulation and movement of trains over the joint track must necessarily be committed to a single head. *That is a business which admits of no divided authority.* And so, too, it must be made the special duty of some one of the companies to keep the joint track and its appurtenances in good order and condi-

tion for the running of trains. (Italics ours.)

Under the several grants the New Haven is neither given the right to regulate nor charged with the duty of maintaining any of the property permissively used. The New Haven exercises no direct control over the movement of its trains over any of the tracks and terminals in question. It has *no possession* of any of the property except as its trains are passing over the tracks and into the terminals. It can not go upon the property to make repairs even should it deem such repairs necessary to insure the safety of its passengers. It can not issue any bonds secured by the physical property composing the terminals. It can not assign its privilege of using the terminals nor does it enjoy any of the characteristic privileges of a joint owner under the practical and long-continued construction placed upon the agreements by the parties themselves.

In this situation the Commission and the Supreme Court of the District of Columbia were correct in their holding that the owning carriers did not part with any ownership in or possession of their properties.

The results of the Court of Appeals' decision.— In support of its contrary finding that the New Haven's rights in the railroad terminal and its approaches (which would embrace the tracks of the Harlem) amounted to a *base fee in an undivided half thereof* (R. 646), the Court of Appeals relies

upon the decision of this Court in *Georgia* v. *Cincinnati So. Ry., supra,* and a decision of the Supreme Judicial Court of Massachusetts in *Proprietors of Locks and Canals* v. *Boston & Maine Railroad,* 245 Mass. 52, 139 N. E. 839.

In the case of *Georgia* v. *Cincinnati So. Ry., supra,* where the State of Georgia granted for the use of the railway a *portion of the right of way of the state-owned* Western & Atlantic Railroad between certain points and later undertook to repeal the act on the ground that it granted merely a license, this Court said (p. 28):

> A grant of the use of a right of way is the grant of a right of way in the ordinary meaning of words, * * *.

As we read its decision, the Court of Appeals has overlooked that the words "right of way" have a twofold meaning. As stated in *Corpus Juris:*

> The term has a twofold signification; it sometimes is used to describe a right belonging to a party, a right of passage over any tract; a mere intangible right to cross; a right of crossing; and it is also used to describe that *strip of land* which railroad companies take *upon which to construct their roadbed.* (54 C. J. 824. Citing *Central Trust Co.* v. *Wabash, etc., R. Co.,* 29 Fed. 546, 555.) (Italics ours.)

The agreements granting the New Haven *permission* to operate over the tracks of the Harlem and into the structure of the terminal of the Cen-

tral do not convey any *land* "upon which to construct their roadbed." The State of Georgia, on the other hand, conveyed away a specific and definite portion of the state-owned right-of-way lands between the points named in the grants *upon which the Cincinnati Southern constructed its railroad for its exclusive use and occupation.*

In *Proprietors of Locks and Canals* v. *Boston & Maine Railroad, supra,* there was a lease of three parcels of *land* to a railroad company during its continuance or until the Commonwealth purchased the railroad under power reserved in granting the charter or until default in payment of rent. The Court, considering this lease and its habendum clause, pointed out that the term may never end since its continuance depends upon events which may never happen and said:

> The effect of the words used was to convey a base fee.

It is to be noted that in that case again, as in the *Cincinnati Southern case,* the grant was of *land* and that the grantor parted with possession and control of the *land* described in the instrument.

It seems to us that the Court of Appeals has been so impressed with the length of the term specified in the grants to the New Haven that it has overlooked or misconstrued the nature of the subject matter of the grants, i. e., a *permission* to participate with the owner in the use of the property.

In *Harrison* v. *Fortlage,* 161 U. S. 57, 63, this Court said:

> The court is not at liberty either to disregard words used by the parties, descriptive of the *subject matter,* or of any material incident, or to insert words which the parties have not made use of. (Italics ours.)

The New Haven, we submit, can not have an easement in the Harlem's property since there is no dominant tenement to which it attaches. (19 C. J., 862–864; *Drucker* v. *Manhattan R. Co.,* 213 N. Y. 543 and 214 N. Y. 658, 108 N. E. 74 and 1093; *Nellis* v. *Munson,* 108 N. Y. 453.)

Nor can the New Haven have a base fee in *an undivided half* of the Grand Central Terminal when its per cent of actual permissive use on June 30, 1915, which was the basis of aportionment sought, amounted to only 41.93 per cent. (R. 61, 65.)

Since the New Haven at the time of this suit had continuously reported the rights in controversy as trackage rights described as "no proprietary rights but only the rights of a licensee" (Ex. 20, R. 636), and since this construction harmonizes with the practical construction of the parties, we read the decision of the Court of Appeals as in effect making for the parties, by construction, different agreements than the parties either made or intended. *Green et al.* v. *Biddle,* 8 Wheat. 1, 89–90, and *Gavinzel* v. *Crump,* 22 Wall. 308.

The Court of Appeals, we submit, has erroneously failed to apply the applicable decision of this Court in *Union Pacific R. Co.* v. *Chicago, R. I. & P. R. Co., supra,* and has erroneously, in a mandamus proceeding, reviewed and reversed the Commission's classification of the New Haven's rights as "trackage rights," and has so construed the contracts as to make for the New Haven "better agreements than they themselves have been satisfied to make." *Green County, Kentucky* v. *Quinlan,* 211 U. S. 582, 596.

CONCLUSION

For the foregoing reasons it is submitted that the judgment of the Court of Appeals should be reversed and the judgment of the Supreme Court of the District of Columbia dismissing the petition affirmed.

Respectfully submitted.

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APPENDIX

SEC. 19A OF THE ACT

The material provisions of Sec. 19a of the Interstate Commerce Act (37 Stat. L. 701, as amended) are as follows:

(a) That the Commission shall, as hereinafter provided, investigate, ascertain, and report the value of all the property owned or used by every common carrier subject to the provisions of this Act. To enable the Commission to make such investigation and report, it is authorized to employ such experts and other assistants as may be necessary. The Commission may appoint examiners who shall have power to administer oaths, examine witnesses, and take testimony. The Commission shall make an inventory which shall list the property of every common carrier subject to the provisions of this Act in detail, and show the value thereof as hereinafter provided, and shall classify the physical property, as nearly as practicable, in conformity with the classification of expenditures for road and equipment, as prescribed by the Interstate Commerce Commission.

(b) First. In such investigation said Commission shall ascertain and report in detail as to each piece of property, other than land, owned or used by said common carrier for its purposes as a common carrier, the original cost to date, the cost of reproduction new, the cost of reproduction less de-

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eral States and Territories and the District of Columbia, classified and in detail as herein required.

(d) Such investigation shall be commenced within sixty days after approval of this Act and shall be prosecuted with diligence and thoroughness, and the result thereof reported to Congress at the beginning of each regular session thereafter until completed.

(e) Every common carrier subject to the provisions of this Act shall furnish to the Commission or its agents from time to time and as the Commission may require maps, profiles, contracts, reports of engineers, and any other documents, records, and papers, or copies of any or all of the same, in aid of such investigation and determination of the value of the property of said common carrier, and shall grant to all agents of the Commission free access to its right of way, its property, and its accounts, records, and memoranda whenever and wherever requested by any such duly authorized agent, and every common carrier is hereby directed and required to cooperate with and aid the Commission in the work of the valuation of its property in such further particulars and to such extent as the Commission may require and direct, and all rules and regulations made by the Commission for the purpose of administering the provisions of this section and section twenty of this Act shall have the full force and effect of law. Unless otherwise ordered by the Commission, with the reasons therefor, the records and data of the Commission shall be open to the inspection and examination of the public.

(f) Upon the completion of the valuation herein provided for the Commission shall

thereafter in like manner keep itself informed of all extensions and improvements or other changes in the condition and value of the property of all common carriers, and shall ascertain the value thereof, and shall from time to time, revise and correct its valuations, showing such revision and correction classified and as a whole and separately in each of the several States and Territories and the District of Columbia, which valuations, both original and corrected, shall be tentative valuations and shall be reported to Congress at the beginning of each regular session.

* * * * *

(h) Whenever the Commission shall have completed the tentative valuation of the property of any common carrier, as herein stated, and before such valuation shall become final, the Commission shall give notice by registered letter to the said carrier, the Attorney General of the United States, the governor of any State in which the property so valued is located, and to such additional parties as the Commission may prescribe, stating the valuation placed upon the several classes of property of said carrier, and shall allow thirty days in which to file a protest of the same with the Commission. If no protest is filed within thirty days, said valuation shall become final as of the date thereof.

(i) If notice of protest is filed the Commission shall fix a time for hearing the same, and shall proceed as promptly as may be to hear and consider any matter relative and material thereto which may be presented in support of any such protest so filed as aforesaid. If after hearing any protest of such tentative valuation under the provisions of this Act the Commission shall be of the opinion that its valuation should not become final,

it shall make such changes as may be necessary, and shall issue an order making such corrected tentative valuation final as of the date thereof. All final valuations by the Commission and the classification thereof shall be published and shall be prima facie evidence of the value of the property in all proceedings under the Act to regulate commerce as of the date of the fixing thereof, and in all judicial proceedings for the enforcement of the Act approved February fourth, eighteen hundred and eighty-seven, commonly known as "the Act to regulate commerce," and the various Acts amendatory thereof, and in all judicial proceedings brought to enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission.

(j) If upon the trial of any action involving a final value fixed by the Commission, evidence shall be introduced regarding such value which is found by the court to be different from that offered upon the hearing before the Commission, or additional thereto and substantially affecting said value, the court, before proceeding to render judgment shall transmit a copy of such evidence to the Commission, and shall stay further proceedings in said action for such time as the court shall determine from the date of such transmission. Upon the receipt of such evidence the Commission shall consider the same and may fix a final value different from the one fixed in the first instance, and may alter, modify, amend, or rescind any order which it has made involving said final value, and shall report its action thereon to said court within the time fixed by the court. If the Commission shall alter, modify, or amend its order, such altered, modified, or amended order shall take the place of the original

order complained of and judgment shall be rendered thereon as though made by the Commission in the first instance. If the original order shall not be rescinded or changed by the Commission, judgment shall be rendered upon such original order.

SEC. 15A OF THE ACT

The material provisions of Sec. 15a of the Interstate Commerce Act (41 Stat. L. 488) are as follows:

(1) When used in this section the term "rates" means rates, fares, and charges, and all classifications, regulations, and practices, relating thereto; the term "carrier" means a carrier by railroad or partly by railroad and partly by water, within the continental United States, subject to this Act, * * * and the term "net railway operating income" means railway operating income, including in the computation thereof debits and credits arising from equipment rents and joint facility rents.

(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: *Provided,* That the Commission shall have reasonable latitude to modify or adjust any

particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country.

(3) The Commission shall from time to time determine and make public what percentage of such aggregate property value constitutes a fair return thereon, and such percentage shall be uniform for all rate groups or territories which may be designated by the Commission. In making such determination it shall give due consideration, among other things, to the transportation needs of the country and the necessity (under honest, efficient and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation: * * *.

(4) For the purposes of this section, such aggregate value of the property of the carriers shall be determined by the Commission from time to time and as often as may be necessary. The Commission may utilize the results of its investigation under section 19a of this Act, in so far as deemed by it available, and shall give due consideration to all the elements of value recognized by the law of the land for rate-making purposes, and shall give to the property investment account of the carriers only that consideration which under such law it is entitled to in establishing values for rate-making purposes. Whenever pursuant to section 19a of this Act the value of the railway property of any carrier held for and used in the service of transportation has been finally ascertained, the value so ascertained shall be deemed by the Commission to be the value thereof for the purpose of determining such aggregate value.

(5) Inasmuch as it is impossible (without regulation and control in the interest of the commerce of the United States considered as a whole) to establish uniform rates upon competitive traffic which will adequately sustain all the carriers which are engaged in such traffic and which are indispensable to the communities to which they render the service of transportation, without enabling some of such carriers to receive a net railway operating income substantially and unreasonably in excess of a fair return upon the value of their railway property held for and used in the service of transportation, it is hereby declared that any carrier which receives such an income so in excess of a fair return, shall hold such part of the excess, as hereinafter prescribed, as trustee for, and shall pay it to, the United States.

(6) If, under the provisions of this section, any carrier receives for any year a net railway operating income in excess of 6 per centum of the value of the railway property held for and used by it in the service of transportation, one-half of such excess shall be placed in a reserve fund established and maintained by such carrier, and the remaining one-half thereof shall, within the first four months following the close of the period for which such computation is made, be recoverable by and paid to the Commission for the purpose of establishing and maintaining a general railroad contingent fund as hereinafter described. * * * The value of such railway property shall be determined by the Commission in the manner provided in paragraph (4).

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